No. 14-95

Title:	Patrick Glebe, Superintendent, Stafford Creek Corrections Center, Petitioner v. Joshua James Frost
Docketed:	July 29, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-35114)
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~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 25 2014	Petition for a writ of certiorari filed. (Response due August 28, 2014)
Aug 19 2014	Order extending time to file response to petition to and including September 29, 2014.
Aug 28 2014	Brief amici curiae of The States of Arizona, et al. filed.
Sep 29 2014	Brief of respondent Joshua James Frost in opposition filed.
Sep 29 2014	Motion for leave to proceed in forma pauperis filed by respondent Joshua James Frost.
Oct 14 2014	Reply of petitioner Patrick Glebe, Superintendent, Stafford Creek Corrections Center filed.
Oct 15 2014	DISTRIBUTED for Conference of October 31, 2014.
Nov 3 2014	DISTRIBUTED for Conference of November 7, 2014.
Nov 10 2014	DISTRIBUTED for Conference of November 14, 2014.
Nov 17 2014	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 17 2014	Petition GRANTED. Judgment REVERSED and case REMANDED for further proceedings consistent with this opinion. Opinion per curiam. (Detached Opinion)
Dec 19 2014	JUDGMENT ISSUED

No. 14-95

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK GLEBE, SUPERINTENDENT,
STAFFORD CREEK CORRECTIONS CENTER,

Petitioner,

v.

JOSHUA JAMES FROST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Herring v. New York*, 422 U.S. 853 (1975), this Court held that a trial judge has "great latitude" to limit the scope of closing argument in a criminal case, but cannot "deny absolutely" any opportunity for summation. *Id.* at 862-63. This Court has never determined whether a lesser restriction on closing argument is structural error or can be harmless. In this case, the trial court restricted closing argument by requiring defense counsel to choose between two inconsistent theories. The Washington Supreme Court deemed this error, but found it harmless in light of the defendant's repeated confessions and other evidence proving his guilt. On review under 28 U.S.C. § 2254(d), a sharply divided *en banc* panel of the Ninth Circuit granted habeas relief, finding that *Herring* clearly established that this restriction on closing argument was structural error. The question presented is:

Does *Herring v. New York* clearly establish that a limitation on closing argument is structural error, as the Ninth Circuit held here, or, as many other courts have held, does *Herring* allow the possibility that such a limitation is subject to harmless error review?

PARTIES

The Petitioner is Patrick Glebe, the Superintendent of the Stafford Creek Corrections Center. Mr. Glebe is the successor in office to Ron Van Boening, who, prior to his retirement, was the custodian of Mr. Frost and the respondent-appellee in the Ninth Circuit. Mr. Glebe is substituted pursuant to Supreme Court R. 35.3. The Respondent is Joshua James Frost, a state prisoner, the petitioner-appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Patrick Glebe, the Superintendent of the Stafford Creek Corrections Center, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Frost v. Van Boening*, ___ F.3d ___ (9th Cir. 2014). App. 1a-40a. The opinion of the prior three judge panel was reported at 692 F.3d 924 (9th Cir. 2012). App. 41a-75a. The order of the United States District Court for the Western District of Washington denying habeas corpus relief, and the report and recommendation of the United States Magistrate Judge, are unreported. App. 77a-80a, and App. 81a-114a. The opinion of the Washington Supreme Court affirming Frost's conviction on direct appeal is reported as *State v. Frost*, 160 Wash.2d 765, 161 P.3d 361 (2007). App. 115a-137a. The unreported opinions in the state court collateral proceedings are not relevant to the issues raised in this petition.

JURISDICTION

The court of appeals entered its opinion on April 29, 2014. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The sixth amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The fourteenth amendment to the United States Constitution provides, in relevant part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

INTRODUCTION

In a 6-5 *en banc* opinion, the Ninth Circuit overturned a Washington State criminal conviction based on a rule this Court has not clearly established. In doing so, the Ninth Circuit created a new category of structural error that this Court has never recognized, opened an untold number of long-final state court convictions to challenge based on this new type of error, ignored this Court's repeated directives about the proper scope of habeas review, and created a conflict with many other circuit courts and state courts. This Court's review is warranted.

Respondent Frost was tried in Washington state court for armed robbery and assault. He repeatedly confessed to the crimes. In closing argument, his lawyer wanted to argue both that Frost had not committed the crimes and that he had committed the crimes under duress. The trial judge held, under state law, that Frost could not offer these inconsistent defenses, and required him to choose between them. Frost focused his argument on duress and was convicted. The Washington Supreme Court affirmed, finding that the trial court had misunderstood state law in forcing counsel to choose between the two theories, but that the error was harmless due to the overwhelming evidence against Frost, his confessions, and the jury instructions.

After a federal district court and a panel of the Ninth Circuit rejected Frost's habeas petition, the *en banc* court reversed. Deeming this an "easy" case, App. 10a, six judges of the Ninth Circuit held that *Herring v. New York* clearly established that the trial court's limitation on closing argument here was structural error. *Herring*, however, involved the

complete denial of closing argument, and this Court has never extended its holding to a lesser restriction on closing argument like the one in this case.

This Court's review is warranted for several reasons. First, the Ninth Circuit's decision conflicts with numerous decisions of this Court. This Court has carefully limited recognition of structural errors because such errors require reversal regardless of any likelihood of the defendant's innocence. Nonetheless, the Ninth Circuit created a significant new category of structural error that will provide an additional basis for collateral attack on convictions in the eleven states in this Circuit. Remarkably, the Ninth Circuit created this new rule on habeas review, in conflict with this Court's repeated instructions not to go beyond this Court's holdings in defining clearly established law. In doing so, the Ninth Circuit also relied on its own precedent to define clearly established law, again contrary to this Court's precedent. Finally, in recognizing this new type of structural error, the Ninth Circuit created a conflict with decisions of several other circuits and state appellate courts. The State of Washington asks this Court to grant certiorari.

STATEMENT

A. Facts and State Court Proceedings

Over the course of eleven days in April 2003, Frost and two accomplices committed five armed robberies. App. 116a. In the first, the three men robbed an elderly couple in their home using firearms. App. 116a. They next robbed a fast-food restaurant while armed with guns. App. 116a. The third robbery was in an adult video store. App. 116a.

Frost cased the store before the robbery and acted as the driver. App. 116a. Frost was also the driver for the fourth robbery, which took place at a convenience store, where an employee was shot in the hand during the robbery. App. 116a. Immediately after the fourth robbery, Frost drove his accomplices to another store, where they committed the fifth robbery. App. 116a. Three days later, Frost was arrested. He made three taped confessions to the police, admitting that he committed the crimes. App. 116a.

1. A Jury Convicted Frost Based on Overwhelming Evidence, Including His Multiple Confessions

The State charged Frost with six counts of robbery, one count of burglary, one count of attempted robbery, and three counts of assault. Most of the charges included firearm enhancements. During opening statements, defense counsel conceded Frost was guilty of some of the charges. App. 139a-143a. Specifically, counsel admitted Frost was guilty of the home invasion robbery, although he contended Frost did not assault the home's residents. App. 140a-141a. Counsel made these admissions in seeking to develop Frost's duress defense, stating that the evidence would show that while Frost "was along for the ride" for the robberies that followed the first, he participated out of fear that one of his accomplices would harm him or his family. App. 141a.

The jury received extensive evidence of Frost's guilt, including testimony from the victims, items from the robberies found in Frost's home, and Frost's three taped confessions. Moreover, Frost testified to

present his claim that he participated in the robberies under duress. In his testimony, he admitted participating in the robberies. In particular, his testimony demonstrated that he acted as an accomplice in all of the robberies, because he admitted driving the men to the robbery locations knowing they were armed with firearms and intended to commit the robberies. App. 146a.

The trial judge indicated that Frost's testimony entitled him to a duress instruction. App. 145a. The judge said the duress instruction would apply to all of the charges except the assault charges because Frost had not admitted committing the assaults. App. 145a. Defense counsel asked, "Is the court telling me I have to explain to the jury that we admit all the elements of the all [*sic*] the offenses charged?" App. 146a. The judge responded, "no," but said counsel could not ask the jury to apply the duress instructions to the assault charges because Frost denied committing the assaults. App. 146a. At the same time, the prosecutor expressed concern that counsel would argue first that the prosecution had not proven accomplice liability, and second that Frost acted under duress. App. 146a. The judge responded that this would cause him to deny the duress instruction. The judge reasoned that:

> You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. . . . You must admit the elements of the offense have been proved before you can use the duress offense. Fortunately for you, your client just got on the stand and admitted everything except the assault in the second degree charge. . . . App. 146a.

Following this discussion, the judge properly instructed the jury on the defense of duress and the prosecution's burden to prove the elements of the offenses and accomplice liability. During closing argument, the prosecution repeatedly mentioned its burden to prove Frost's guilt beyond a reasonable doubt. The defense argued that the prosecution had not proven guilt as to the assault charges and the firearm sentencing enhancements. App. 153a-155a. As in opening statements, however, counsel admitted that Frost committed the initial home invasion robbery and argued that Frost acted under duress during the subsequent robberies. App. 150a-164a. The jury convicted Frost on all charges with the exception of one assault charge. App. 117a-118a.

2. The Washington Supreme Court Held that the Trial Court Erred in Limiting Closing Argument, but Found the Error Harmless

After the state court of appeals affirmed, the Washington Supreme Court addressed Frost's claim that the trial court had improperly restricted his closing argument. The court held that the trial judge erred in limiting closing argument, finding that the trial court had misinterpreted state law on duress and that the ruling infringed on Frost's rights to counsel and due process. App. 118a-128a. The state court then conducted an extensive analysis of whether this type of error was structural or potentially harmless under this Court's decisions. App. 128a-132a (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), *Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006), and *Neder v. United States*, 527 U.S. 1, 8-9 (1999)).

Carefully applying this Court's case law holding that most types of error can be harmless, the Washington Supreme Court held that the error in Frost's case was not structural. App. 128a-132a. The court found that the trial court's limitation on the scope of closing argument did "not necessarily 'render[ ] [the] criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" App. 131a (quoting *Recuenco*, 548 U.S. at 218-19). Rather, the error merely affected the trial process and was akin to other trial errors this Court has deemed harmless, such as an instruction omitting an element of the offense or an improper limitation on cross-examination. App. 132a.

The state court then analyzed whether the error was harmless in this case, concluding that it was. The court found the "untainted evidence" so "overwhelming that it necessarily leads to a finding of guilt." App. 132a. "[A]ny reasonable jury would have convicted Frost, even absent the trial court's limitation on counsel's argument." App. 133a (quotation marks omitted). "The fact the jury was properly instructed on the State's burden of proof in general, as well as instructed on the specific burden of proof to establish accomplice liability, supports the conclusion that the trial court's error was harmless." App. 133a (footnotes omitted). This Court denied Frost's petition for certiorari. *Frost v. Washington*, 552 U.S. 1145 (2008).[1]

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[1] The state courts denied Frost's collateral challenges to his convictions. Those proceedings are irrelevant to this petition.

B. Federal Habeas Proceedings

1. The District Court and Ninth Circuit Panel Denied Relief

Frost petitioned for relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), alleging that the trial judge violated his rights to counsel and due process by limiting the scope of his closing argument. The magistrate judge recommended denial of the petition. App. 81a-114a. Distinguishing *Herring*, the magistrate judge concluded that "*Herring* did not hold that placing a limit on closing arguments, such as the one placed on Frost, is a structural error that violates the Sixth Amendment." App. 94a. As a result, the state court adjudication was in line with this Court's recent jurisprudence on structural error. App. 95a. The district court adopted the magistrate judge's recommendation. App. 77a-80a.

A Ninth Circuit panel affirmed in a 2-1 opinion. App. 41a-75a. The "Washington Supreme Court's decision that the trial court's restriction was not structural error is neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court." App. 49a. The panel held that *Herring* clearly establishes the "*total* denial of closing argument" is structural error, but "*Herring* is silent on whether a limitation, such as the one imposed by the trial court in this case, is structural error." App. 50a (citations omitted). The panel found the state court adjudication was not unreasonable because "a rational jurist could conclude that there is a fundamental difference

between a complete denial of closing argument and a limitation on the scope of closing argument." App. 51a. The panel noted that *Herring* acknowledges that trial judges are "given great latitude in controlling the duration and limiting the scope of closing summations." App. 52a. The panel also cited this Court's cases on structural error to support the state court decision to apply harmless error analysis. App. 56a-57a. Last, the panel held the state court determination that the error was harmless was reasonable in light of the record. App. 58a-64a.

A dissenting judge argued that *Herring* governed the limitation on Frost's closing argument and that the state court adjudication was an unreasonable application of *Herring*. App. 64a-75a.

2. The Ninth Circuit Held *En Banc* that Clear Federal Law Prohibited Harmless Error Review

In a 6-5 ruling, a majority of the Ninth Circuit *en banc* panel held that the Washington Supreme Court unreasonably applied clearly established federal law by reviewing for harmless error. App. 18a. The majority gave two reasons.

First, the majority held that *Herring* directly controlled. "In assessing whether the error in this case is structural, our task is easy because the Supreme Court has determined that *Herring* error is structural." App. 10a. The majority believed the trial court had "[p]reclud[ed] defense counsel from arguing a legitimate defense theory," App. 12a, and cited two prior Ninth Circuit cases where it had "held that preventing a defendant from arguing a legitimate defense theory constitutes structural

error." App. 11a. (citing *United States v. Miguel*, 338 F.3d 995, 1000-03 (9th Cir. 2003); *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000)). The majority also concluded "[t]he denial of closing argument here was far worse than what occurred in *Herring*." App. 11a. In the majority's view, while *Herring* involved a denial of closing argument to both the prosecution and defense, this case was worse because the judge restricted only the defendant's closing. App. 11a.

As a second rationale, the *en banc* majority concluded that the trial court's restriction on closing argument effectively reduced the state's burden of proof, and "was tantamount to a directed verdict on guilt." App. 13a. The majority concluded that the restriction thus was prohibited by *In re Winship*, 397 U.S. 358 (1970), which held that due process requires the prosecution to prove guilt beyond a reasonable doubt. App. 12a. In the majority's view, "the trial judge's actions took the question of reasonable doubt away from the jury." App. 14a.

Five judges dissented in an opinion by Judge Tallman. They argued that "[b]y declaring structural error in this circumstance, our court once again ignores the Supreme Court's trenchant instructions to exercise restraint in defining clearly established federal law." App. 19a. "There is a fundamental difference between the complete denial of closing argument at issue in *Herring* and the limitations on closing argument imposed in Frost's trial." App. 19a. "*Herring* is silent on whether an erroneous limitation requiring a defendant to choose between two incompatible defenses, such as the one imposed by the trial court in this case, is structural error." App. 19a-20a. The dissenting judges thus

concluded that the majority had violated this Court's repeated admonition "not to infer extensions from the rules identified in its opinions." App. 24a (citing *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (*per curiam*)). App. 24a. The dissenting judges also pointed out that the majority violated this Court's precedent by relying on circuit precedent to determine clearly established law. App. 27a-28a.

The dissent concluded that the majority opinion again "fail[s] to grant appropriate deference as required by AEDPA" and "it also ignores the Supreme Court's admonition to find structural error only in rare and limited circumstances." App. 23a. "In the absence of a United States Supreme Court opinion holding that partial restrictions on closing argument amount to structural error, and in light of the Court's precedent that most errors are subject to harmless-error review," the state court's holding that the error was harmless was not objectively unreasonable. App. 23a. The dissent recognized the majority's new rule was significant because it expanded the structural error doctrine to cases where it did not apply before. App. 26a-27a.

Finally, the dissenting judges pointed out that the majority "bends the facts of the case . . . by framing a choice as a mandate." App. 31a. Contrary to the majority opinion, the trial judge did not require that Frost admit his guilt to the jury. Nor did the judge forbid Frost from arguing the prosecution had not met its burden of proof. "The trial judge repeatedly indicated that Frost was free to assert that the prosecution had not proved accomplice liability." App. 31a. In reality, the judge simply "requir[ed] Frost to 'opt for one theory or the

other," and while that may have been error, the judge did not force Frost to admit guilt. App. 31a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision conflicts with decisions of this Court and other courts in important respects warranting this Court's review.

The Ninth Circuit's decision conflicts with decisions of this Court in several ways. First, in extending *Herring*'s holding to the very different situation in this case, the Ninth Circuit ignored this Court's repeated admonitions that "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). Second, the Ninth Circuit ignored this Court's holdings by "consulting its own precedents" to evaluate Frost's claim for relief under 28 U.S.C. § 2254(d), which requires that a state court decision be contrary to "'clearly established Federal law, *as determined by the Supreme Court*.'" *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (emphasis added). Third, in defining a new type of structural error, the Ninth Circuit ignored this Court's repeated directive that "'most constitutional errors can be harmless.'" *Recuenco*, 548 U.S. at 218 (quoting *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 306)).

The Ninth Circuit's decision also conflicts with many decisions of other circuit courts and state courts. The Ninth Circuit's conclusion that it is clearly established that any restriction on closing

argument that prevents a defendant from arguing a legitimate theory is structural error flies in the face of decisions from at least four circuits and many state courts that have applied harmless error analysis to such restrictions. Similarly, the Ninth Circuit's holding that it is clearly established structural error to force a defendant to admit the elements of the crime before pleading an affirmative defense conflicts with dozens of contrary state laws and holdings of state and federal courts. The Ninth Circuit's side of these splits is now firmly established by an *en banc* decision, requiring this Court's intervention.

The Ninth Circuit's errors not only create conflicts, but will also have real impacts on states in the Ninth Circuit. A finding of structural error requires automatic reversal without any evidence that the error affected the outcome below. In the eleven states in the Ninth Circuit, courts now must apply this new rule that certain restrictions on closing argument require automatic reversal. This Court should grant certiorari.

A. The Ninth Circuit Ruling Conflicts with Many Decisions of this Court

The Ninth Circuit's ruling conflicts with decisions of this Court in three crucial respects, which together warrant this Court's review. First, it went beyond this Court's prior holdings in defining clearly established federal law. Second, it relied on its own precedent to determine clearly established federal law. And third, it ignored this Court's cases on what constitutes structural error.

1. The Ninth Circuit Went Far Beyond Prior Holdings of this Court In Determining Clearly Established Federal Law

Under AEDPA, "a federal court may grant habeas relief on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). This Court has repeatedly held that: "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of this Court." *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). Implications that purportedly follow from a prior holding are insufficient to create clearly established federal law. *Kane v. Espitia*, 546 U.S. 9, 10 (2005); *Mickens v. Taylor*, 535 U.S. 162 (2002). Thus, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White*, 134 S. Ct. at 1706 (quoting *Yarborough*, 541 U.S. at 666). The Ninth Circuit ruling fundamentally conflicts with these principles because it grants habeas relief based on expanding the holding in *Herring* to apply to a radically different situation.

Herring held that "a total denial of the opportunity for final argument in a nonjury criminal trial" violates the Sixth Amendment right to counsel. *Herring*, 422 U.S. at 858-59. At the conclusion of

Herring's bench trial, defense counsel asked "'to be heard somewhat on the facts.'" *Herring*, 422 U.S. at 856. Relying on a statute, the judge responded, "'I choose not to hear summations.'" *Id.* This Court reversed Herring's conviction, holding that a complete denial of closing argument violates the Sixth Amendment. *Id.* at 857-65. "[T]here can be no justification for a statute that empowers a trial judge to *deny absolutely* the opportunity for *any* closing summation *at all*." *Id.* at 863 (emphasis added). The *Herring* Court then cautioned that its ruling did not mean "that closing arguments in a criminal case must be uncontrolled, or even unrestrained." *Id.* at 862. A trial judge "must be and is given great latitude in controlling the duration and limiting the scope of closing summations." *Id.*

The Ninth Circuit extended *Herring*. The trial court here did not "deny absolutely the opportunity for any closing summation at all." *Id.* at 863. Rather, it required Frost's counsel to choose between two inconsistent theories in presenting closing argument. App. 145a-148a. Neither *Herring* nor any subsequent decision of this Court holds that such a restriction is structural error.

The Ninth Circuit framed the trial court's alleged error as "[p]recluding defense counsel from arguing a legitimate defense theory . . . ." App. 12a. But even framed in this way, *Herring* does not control. *Herring* dealt with a complete denial of closing argument, not a refusal to hear one defense theory. Indeed, *Herring* itself recognized that judges retain broad discretion in controlling the scope of closing argument. *Herring*, 422 U.S. at 862. Moreover, the rationale of *Herring*, as explained in later cases, is that it involved the complete denial of

the assistance of counsel at a crucial stage of the proceeding: closing argument. *See, e.g., Bell v. Cone*, 535 U.S. 685, 696 n.3 (2002). That is not remotely what occurred here.

The *en banc* majority also went beyond this Court's precedent when it bolstered its finding of structural error by holding that the trial judge's action impermissibly reduced the prosecution's burden of proof. App. 12a-15a. Citing *In re Winship*, 397 U.S. 358 (1970), the majority essentially held that a state court clearly violates federal due process if it requires a defendant to choose between denying that he committed a crime and presenting an affirmative defense. App. 12a-15a. This Court has never so held. *Winship* simply makes clear that the Due Process Clause requires application of the beyond-a-reasonable-doubt standard in criminal cases. *Winship*, 397 U.S. at 364. No decision of this Court forbids Congress or the states from conditioning the presentation of affirmative defenses on admitting commission of the crime. For example, this Court has made clear that because the entrapment "defense is not of a constitutional dimension, Congress may . . . adopt any substantive definition of the defense that it may find desirable." *United States v. Russell*, 411 U.S. 423, 433 (1973). A number of states require defendants to admit commission of a crime before pleading the affirmative defense of entrapment,[2] and this Court

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[2] *See, e.g., People v. Gillespie*, 136 Ill.2d 496, 501-03, 557 N.E.2d 894, 896–98 (1990); *People v. Hendrickson*, 45 P.3d 786, 791 (Colo. App. 2001); *Young v. State*, 308 Ark. 647, 651-52, 826 S.W.2d 814, 816 (1992); *State v. Soule*, 168 Ariz. 134, 135-36, 811 P.2d 1071, 1072-73 (1991) (*en banc*).

has never held such a rule violates due process.[3] Indeed, federal courts have upheld such laws against due process challenges. *See, e.g.*, *Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (en banc) (Posner, J.).

Moreover, even if such a rule did reduce the prosecution's burden of proof, the Ninth Circuit still went far beyond this Court's cases, because this Court has applied harmless error analysis in many cases involving errors that reduced the prosecution's burden of proof.[4] Similarly (and also contrary to the majority's rationale), this Court has applied harmless error review when the defendant is denied his right to a jury finding on a particular issue, such as when the jury is not required to find the existence of an aggravating sentencing factor by proof beyond a reasonable doubt. *Recuenco*, 548 U.S. 212 (holding an error under *Blakely v. Washington*, 542 U.S. 296 (2004) is subject to harmless error analysis).

In short, the Ninth Circuit again ignored this Court's instructions about how to apply AEDPA. As this Court stated the week before the Ninth Circuit's ruling, "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced

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[3] *Cf. Mathews v. United States*, 485 U.S. 58, 62 (1988) (holding, as a matter of federal common law, that a defendant in a federal criminal case may argue both entrapment and that he did not commit the crime).

[4] *See Neder*, 527 U.S. at 9-10 (citing *Yates v. Evatt*, 500 U.S. 391 (1991) (affecting mandatory rebuttable presumption); *Carella v. California*, 491 U.S. 263 (1989) (per curiam) (affecting a mandatory conclusive presumption); *Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of element); *Rose v. Clark*, 478 U.S. 570 (1986) (erroneous burden-shifting as to an element of an offense)).

rules not clearly established under the guise of extensions to existing law.'" *White*, 134 S. Ct. at 1706 (quoting *Yarborough*, 541 U.S. at 666). The primary function of habeas corpus is "to ensure that state convictions comport with the *federal* law that was established at the time petitioner's conviction became final." *Sawyer v. Smith*, 497 U.S. 227, 239 (1990). "The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d)(1)." *White*, 134 S. Ct. at 1707.

2. The *En Banc* Majority Relied on Ninth Circuit Cases, in Conflict with AEDPA and this Court's Clear Direction

This Court has repeatedly held that "a lower court may not 'consul[t] its own precedents, rather than those of this Court, in assessing 'a habeas claim governed by § 2254.'" *White*, 134 S. Ct. at 1702 n. 2 (quoting *Parker*, 132 S. Ct. at 2155). Nonetheless, in this case the Ninth Circuit declared that its own circuit precedent is "persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is 'clearly established.'" App. 11a n.1. Indeed, the new rule the Ninth Circuit announced—that "preventing a defendant from arguing a legitimate defense theory constitutes structural error"—came solely from two Ninth Circuit decisions, *United States v. Miguel*, 338 F.3d 995, 1000-03 (9th Cir. 2003), and *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000)). App. 11a & n.1. This reliance on circuit precedent to grant relief is "a textbook example" of what AEDPA proscribes. *Parker*, 132 S.

Ct. at 2149. Because "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,'" it "cannot form the basis for habeas relief under AEDPA." *Parker*, 132 S. Ct. at 2155.

The Ninth Circuit's ostensible reasons for citing *Miguel*, 338 F.3d 995, and *Conde*, 198 F.3d 734, do not pass muster. Neither case sheds light on whether a limitation on closing argument clearly amounts to structural error under this Court's rulings. *Conde* did not apply the AEDPA standard at all because the habeas petition in that case was filed before AEDPA's enactment. *Conde*, 198 F.3d at 738. *Miguel* was a direct review case in which the Ninth Circuit found structural error based on "this circuit's caselaw." *Miguel*, 338 F.3d at 1003. The rulings thus do nothing to bolster a conclusion that *Herring* controls this case.

Unless this Court grants the petition for certiorari, federal courts in the Ninth Circuit will rely on this *en banc* ruling to conclude that circuit precedent remains a reliable source for determining clearly established law when reviewing state court decisions under AEDPA.

3. The Ninth Circuit's Decision Conflicts with this Court's Cases on Structural Error

Structural error is a powerful doctrine, requiring reversal of criminal convictions without any showing that an error affected the outcome. In part for that reason, this Court has carefully limited what errors it considers structural, and has made clear that "'most constitutional errors can be harmless.'" *Recuenco*, 548 U.S. at 218 (quoting

Neder, 527 U.S. at 8). Nonetheless, the Ninth Circuit here concluded that "preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a. This holding substantially expands the structural error doctrine in the Ninth Circuit beyond anything this Court has held, in direct conflict with this Court's approach.

To decide whether an error is structural, this Court has applied a strict test. An error is structural if it "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Recuenco*, 548 U.S. at 218-19 (quoting *Neder*, 527 U.S. at 9) (emphasis deleted)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" *Recuenco*, 548 U.S. at 218 (quoting *Neder*, 527 U.S. at 8). Applying this test, this Court has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Neder*, 527 U.S. at 8 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

The Ninth Circuit did not apply this approach. Instead, it simply concluded that the error here was "*Herring* error," rendering the court's task "easy because the Supreme Court has determined that *Herring* error is structural." App. 10a. This simplistic analysis ignores this Court's guidance.

Specifically, the Ninth Circuit extrapolated from *Herring*'s holding to create a new type of structural error. *Herring* itself simply held that the complete denial of closing argument is error, never analyzing whether such error is structural.

Subsequent cases made clear that the complete denial of closing argument is structural error because it amounts to the complete denial of the assistance of counsel at a crucial stage of the proceeding. *See, e.g., Bell*, 535 U.S. at 696 n.3. The Ninth Circuit went beyond these prior holdings, announcing a new rule that "preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a. But any number of errors might prevent a defendant from arguing a legitimate defense theory, and this Court has found many such errors subject to harmless error review.

For example, in *Crane v. Kentucky*, 476 U.S. 683 (1986), defense counsel wanted to show the jury that his client's confession was coerced. The trial court barred him from presenting facts relevant to that argument, leaving the defendant "stripped of the power to describe to the jury the circumstances that prompted his confession." *Id.* at 689. This Court recognized that this defense was central to the defendant's case, and that "introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding." *Id.* at 691. Nonetheless, the Court unanimously held that "the erroneous ruling of the trial court is subject to harmless error analysis." *Id.*

Similarly, in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the trial court barred defense counsel from asking a key witness about the deal he received from the prosecution in exchange for his testimony. This Court recognized that, from this evidence, "a jury might reasonably have found . . . the witness [had] a motive for favoring the prosecution in his testimony." *Id.* at 679. The defense was thus blocked from arguing a key fact

relevant to the witness's credibility. Yet this Court again found the error subject to harmless error analysis. *Van Arsdall*, 475 U.S. at 684.

The bottom line is that, as these and many other cases show, an error at trial that prevents a defendant from presenting a legitimate theory is not automatically structural. Instead, any such error must be assessed on its own terms and under this Court's cases to determine whether it was structural. Given that this was a habeas case, the appropriate question was whether this Court's cases clearly establish that the restriction on closing argument imposed here was structural error. The Ninth Circuit created a conflict with this Court's cases by answering that question based on an extrapolation from one case, when reasonable jurists could (and did) read this Court's case law as allowing harmless error review.

This case illustrates the substantial potential impact if the Ninth Circuit's approach is allowed to stand. Here, there is no real question that the trial court error was harmless. Frost's convictions were built upon his three confessions prior to trial and his own testimony during trial. Under the Ninth Circuit's approach, however, his long-final state conviction must be reversed because his counsel was prevented from "arguing a legitimate defense theory." App. 11a. That nebulous new test will allow collateral attacks on any number of state court convictions where evidence was excluded, questioning was barred, or argument was limited in a way that habeas counsel can portray as limiting the ability to argue a legitimate theory. This Court should grant certiorari to reject this radical broadening of the structural error doctrine.

B. The Ninth Circuit's Decision Conflicts with Decisions of Other Circuits and Many State Appellate Courts

The decision below conflicts with decisions of other circuit courts and state appellate courts in two crucial respects. First, the Ninth Circuit held that *Herring* clearly establishes that preventing closing argument on one "legitimate defense theory" is structural error. App. 11a. But in the 39 years since *Herring* was decided, no other circuit has so held. Instead, at least four circuits and numerous state courts have reviewed this type of restriction for harmless error. Second, the Ninth Circuit stated that it clearly violates due process to force a defendant to admit an offense before presenting an affirmative defense. Other circuits and state supreme courts have held exactly the opposite. These conflicts require resolution by this Court.

1. The Vast Majority of Courts Review Restrictions on Closing Argument for Harmless Error

The majority below held not only that it is structural error to restrict closing argument in a way that prevents the defense from arguing a legitimate theory, but also that this rule is clearly established by decisions of this Court. Many state and federal courts have held to the contrary.

The Eighth Circuit has repeatedly held that limitations on closing argument are not reversible error absent a showing of prejudice. *See, e.g.*, *Richardson v. Bowersox*, 188 F.3d 973, 979-80 (8th Cir. 1999); *United States v. Blanche*, 149 F.3d 763 (8th Cir. 1998); *United States v. Davis*, 557 F.2d

1239, 1244 (8th Cir. 1977). In the Eighth Circuit's most analogous case, *United States v. Wilcox*, 487 F.3d 1163, 1173 (8th Cir. 2007), defense counsel wanted to argue in closing that the lack of physical evidence against his client established reasonable doubt as to whether he committed the sexual assault alleged. The court barred this argument because it had suppressed the physical evidence. After deciding that it was an open question whether the defense should have been allowed to argue about the absence of suppressed evidence, the Eighth Circuit found that it need not resolve the question because "any error in foreclosing this argument was harmless." *Id.*

The D.C. Circuit has also reviewed severe restrictions on closing argument for harmless error. For example, in *United States v. DeLoach*, 504 F.2d 185, 189 (D.C. Cir. 1974), defense counsel sought to argue that the critical witness against the defendant might actually have committed the murder himself, thus giving him an incentive to lie about the defendant's involvement. The judge precluded this argument. *Id.* The D.C. Circuit found that this restriction violated DeLoach's "right to have his theory of the case argued vigorously to the jury." *Id.* Specifically, the court's rulings "entirely precluded counsel from arguing for the several inferences on which his case crucially depended." *Id.* at 190. Nonetheless, the D.C. Circuit went on to conduct an extensive harmless error analysis. *Id.* at 191-93.

The Sixth Circuit has also applied harmless error review to a restriction on closing argument that prevented a defendant from making a relevant defense argument. In *United States v. Poindexter*, 942 F.2d 354 (6th Cir. 1991), two defendants were tried together, and each wanted to argue that the

lack of fingerprint evidence established reasonable doubt. *Id.* at 358-59, 363. A detective had testified there was fingerprint dust on one piece of evidence, but the prosecution presented no evidence showing whether fingerprints were found. *Id.* at 358-59. Defense counsel tried to argue in closing that the prosecution's failure to present fingerprint evidence established reasonable doubt. *Id.* The trial judge barred this argument. The Sixth Circuit reviewed this erroneous restriction for harmless error, concluding that it was harmful for one defendant as to whom the overall evidence was slim. *Id.* at 358-59. The same restriction on closing argument, however, was harmless as to Poindexter, who had been convicted on "very strong" evidence. *Id.* at 363.

The Second Circuit has also interpreted *Herring* by holding that "[a] district court has broad discretion in limiting the scope of summation," and "[t]here is no abuse of discretion if the defendant cannot show prejudice." *United States v. Bautista*, 252 F.3d 141, 145 (2nd Cir. 2001). In *Bautista*, the trial court prevented counsel from arguing about the absence of corroborating evidence, and in doing so stated that "the jury shall decide the case on what is here[.]" *Id.* The trial court's ruling limited argument as to the "absence of evidence in a criminal case," "a valid basis for reasonable doubt," but the Second Circuit deemed the limitation harmless. *Id.*

Several state appellate courts have also refused to find structural error when addressing significant restrictions on closing argument. The Washington Supreme Court's thoughtful decision in this case is one example, but there are a number of others.

For example, the Texas courts have held that trial courts "may not prevent defense counsel from making a point essential to the defense." *Lemos v. State*, 130 S.W.3d 888, 892 (Tex. App. 2004). But even where a trial court commits such an error, Texas appellate courts review for harmlessness. In *Lemos*, for example, the Texas court reversed only because "the erroneous denial of *a legitimate defensive theory* caused Lemos harm." *Id.* (emphasis added). Under the Ninth Circuit's approach, by contrast, no finding of harm would have been required to reverse the conviction.

Similarly, Indiana courts have held that even where a trial judge abuses his discretion in restricting the scope of closing argument, "it is incumbent upon the appellant to establish that the trial court's abuse of discretion was clearly prejudicial to his rights." *Nelson v. State*, 792 N.E.2d 588, 592 (Ind. Ct. App. 2003). "[A]ny abuse of discretion in restricting the scope of closing argument is subject to harmless error analysis." *Id.* Thus, in *Nelson v. State*, 792 N.E.2d 588, the Indiana Court of Appeals held that a trial judge abused his discretion by preventing defense counsel from arguing about a test's reliability—a legitimate defense theory. *Id.* at 593. But the court upheld the conviction after finding the abuse of discretion harmless. *Id.* at 594.

Petitioner is aware of one state, Connecticut, where the courts have held that it is structural error "not only when a defendant is completely denied an opportunity" to present closing argument, "but also when a defendant is deprived of the opportunity to raise [in closing] a significant issue that is reasonably inferable from the facts in evidence."

State v. Arline, 223 Conn. 52, 64, 612 A.2d 755, 761 (1992). Even there, however, although the court cited *Herring* elsewhere in the opinion, it did not cite *Herring* as resolving whether harmless error review applied. *Id.* at 65. Thus, even in adopting a rule similar to the Ninth Circuit's, Connecticut's Supreme Court did not see *Herring* as controlling. This is one of many possible examples indicating that most state courts read *Herring* far more narrowly than the Ninth Circuit did here. *See, e.g.*, *People v. Burnett*, 237 Ill.2d 381, 389, 930 N.E.2d 953, 958 (2010) (noting that *Herring* "was rife with cautionary comments and limitations on the reach of the decision"); *People v. Clark*, 453 Mich. 572, 589-90, 556 N.W.2d 820, 827 (1996) (reviewing for harmless error where the trial court changed the jury instructions after closing argument).

These cases demonstrate conflict with the Ninth Circuit's conclusion that *Herring* clearly establishes that it is structural error to restrict closing argument in a way that prevents the defense from presenting a legitimate theory. The Court should accept review to resolve this conflict.

2. Many Courts Have Held that Due Process Allows States to Require Defendants to Admit an Offense Before Raising an Affirmative Defense

The Ninth Circuit sought to bolster its holding with a second due process rationale, but in doing so it expanded the conflict its decision had already created. Citing *In re Winship*, 397 U.S. 358, the majority essentially held that a state court clearly violates due process if it requires a defendant to

choose between denying that he committed a crime and presenting an affirmative defense. App. 12a-15a. But many courts have held to the contrary.

Most prominently, in *Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (en banc) (Posner, J.), the *en banc* Seventh Circuit held that there was no due process problem with Illinois's requirement that a defendant admit committing an offense before being allowed to argue entrapment. The court held that preventing a defendant from "present[ing] a state-created, not federally required, defense is, as a first approximation anyway, at worst merely to make an error of state law; and if there is one fixed star in the confusing jurisprudence of constitutional criminal procedure, it is that a violation of state law does not violate the Constitution." *Id.* at 501. The State of Washington is aware of no contrary circuit precedent until the majority's decision in this case.

Indeed, many states require defendants to admit commission of an offense before arguing the affirmative defense of entrapment, and those states' courts have routinely upheld this rule against due process challenges. *See, e.g.*, *People v. Gillespie*, 136 Ill.2d 496, 501-03, 557 N.E.2d 894, 896-98 (1990); *People v. Hendrickson*, 45 P.3d 786, 791 (Colo. App. 2001); *Young v. State*, 308 Ark. 647, 651-52, 826 S.W.2d 814, 816 (1992); *State v. Soule*, 168 Ariz. 134, 135-36, 811 P.2d 1071, 1072-73 (1991) (*en banc*); *see generally* Timothy E. Travers, Annotation, *Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged*, 5 A.L.R.4th 1128 (Originally published in 1981).

The majority's *Winship* analysis in this case would call all of these states' rules into question. True, these cases involved entrapment, while this case involves duress, but both are affirmative defenses that involve arguing that someone else induced the defendant to commit a crime he otherwise would not have. And the majority's rationale—that "the trial court relieved the State of its burden of proving guilt beyond a reasonable doubt" by requiring Frost to choose between arguing that he did not commit the offenses and his affirmative defense, App. 14a—would apply equally to entrapment. Thus, the conflict cannot be avoided simply by saying that the defenses involved differ.

In short, besides the conflict the majority created as to *Herring*'s reach, it also created a conflict about the meaning of *Winship*. Both conflicts have important ramifications for state court criminal proceedings, and this Court should resolve both.

CONCLUSION

Given the multiple conflicts between the Ninth Circuit's decision here and the decisions of this Court and other courts, this Court should grant certiorari and reverse the decision below.

RESPECTFULLY SUBMITTED.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA JAMES FROST, *Petitioner-Appellant,* v. RON VAN BOENING, Superintendent, *Respondent-Appellee.*	No. 11-35114 D.C. No. 2:09-cv- 00725-TSZ OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, Senior District Judge, Presiding

Argued and Submitted En Banc
June 26, 2013—Seattle, Washington

Filed April 29, 2014

Before: Alex Kozinski, Chief Judge, and Stephen Reinhardt, Sidney R. Thomas, Kim McLane Wardlaw, Richard A. Paez, Richard C. Tallman, Johnnie B. Rawlinson, Jay S. Bybee, Consuelo M. Callahan, Milan D. Smith, Jr. and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Thomas;
Dissent by Judge Tallman

SUMMARY*

Habeas Corpus

The en banc court reversed the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition challenging the trial court's decision to preclude defense counsel from making a reasonable doubt argument to the jury.

The en banc court held that the trial court infringed petitioner's Sixth and Fourteenth Amendment rights by precluding counsel from making a reasonable doubt argument to the jury, that petitioner was deprived of his right to demand that the jury find him guilty of all the elements of the crime, that the burden of proof was unconstitutionally shifted, and that petitioner's right to present a closing argument was violated. The en banc court held that these errors were structural and not subject to harmless error review. The en banc court reversed and remanded with instructions for the district court to conditionally grant the writ.

Judge Tallman dissented, joined by Judges Rawlinson, Bybee, Callahan, and M. Smith. Judge Tallman would conclude that the state court's interpretation of *Herring v. New York*, 422 U.S. 853 (1975) (holding that preclusion of closing argument in criminal defense trial is structural constitutional error), as inapplicable to reverse petitioner's

*This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

convictions, was neither contrary to nor an unreasonable application of clearly established federal law, and that this court is compelled under the Anti-Terrorism and Effective Death Penalty Act to grant deference to the state court's decision.

COUNSEL

Erik B. Levin, Berkeley, California, for Petitioner-Appellant.

John J. Samson, Assistant Attorney General, Olympia, Washington, for Respondent-Appellee.

OPINION

THOMAS, Circuit Judge:

The Supreme Court has instructed that preclusion of closing argument in a criminal defense trial is structural constitutional error. *Herring v. New York*, 422 U.S. 853, 864–65 (1975). Joshua Frost had two legitimate defenses to criminal charges, but the state trial court only permitted his counsel to argue one theory in closing, and the court specifically prohibited counsel from arguing that the State had not met its burden of proof. Because this conceded constitutional error requires a retrial under *Herring*, we reverse the district court's denial of federal habeas relief.

I

Frost is serving a 55-year prison sentence for his convictions stemming from his involvement in five robberies that occurred over eleven days. In the first robbery, three men—Matthew Williams,

Alexander Shelton, and Frost—robbed and burglarized the home of an elderly couple. Firearms were used, though Frost testified he did not carry a gun. In the second robbery, Frost acted as the driver for Shelton and Williams, who robbed a Taco Time restaurant while armed with guns. In the third robbery, Shelton, Williams, Frost, and another man participated in the robbery of an adult video store. Frost again acted as the driver and performed surveillance prior to the robbery by entering the store and asking about the closing time and other questions. In the fourth robbery, Frost acted as driver for Williams and Shelton, who robbed a 7/Eleven at gunpoint. During this incident, Shelton threatened two customers in the store's parking lot with a gun. Finally, immediately following the 7/Eleven robbery, Frost drove Shelton and Williams to a store, which they also robbed using firearms. During this robbery, an employee was shot in the hand. Police arrested Frost, Shelton, and Williams three days later. Frost was charged with six counts of robbery, one count of burglary, one count of attempted robbery, and three counts of assault. Most charges included firearms enhancements.

Frost admitted his involvement in the incidents in his trial testimony and in recorded statements to police, which were played at trial. The defense theory of the case was two-fold: there was reasonable doubt as to whether Frost's involvement rose to the level of an accomplice and, regardless, any actions he took were under duress. Defense counsel explained both theories in his opening statement and developed both throughout the trial.

During the jury instruction conference, the trial judge responded to Frost's proposed instruction

by observing that "duress is a defense which requires the defendant to admit the elements of the crime before it can be raised."

After some discussion about the instruction, the following colloquy occurred:

> MR. WAGNILD [prosecutor]: My concern is we are going to see him get up in closing and argue, first of all, we haven't proved accomplice liability for any of them and then saying duress.
>
> THE COURT: If he says that[,] the duress instruction will come out of the case.
>
> MR. STIMMEL [defense counsel]: Excuse me, your Honor?
>
> THE COURT: You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. *Riker* is very clear on this. You must admit the elements of the offense have been proved before you can use the duress offense [sic]. Fortunately for you, your client just got on the stand and admitted everything except the assault in the second degree charge. He admitted he knew about it, he participated in every one of these events and he at least assisted by being the get away driver except for the assault in the second degree charge. I can't believe you would disregard your client's testimony.
>
> MR. STIMMEL: But am I not permitted to argue in the alternative, using duress and failure to prove in the alternative?

> THE COURT: No. Duress is an affirmative defense. To quote *Riker*, a defense of duress admits that the defendant committed the unlawful act but pleas an excuse for doing so. You may not argue both. *Riker* wouldn't stand up if that was the ability the defense has. Once the state proves its charges[,] the defense says it is proved and that is when you get an opportunity to raise this affirmative defense and prove it by a preponderance. I don't see any other way to write it. There are pages and pages about this.

The judge concluded the discussion by again warning defense counsel not to try to argue both theories in closing. Thus, defense counsel was precluded from arguing reasonable doubt, forced to at least tacitly admit the elements of the crimes, and then put to the task of proving the duress defense by a preponderance of the evidence.

As a result, defense counsel never argued in closing that the State had failed to meet its burden of proof. He argued only that Frost acted under duress due to threats from Williams. Counsel admitted that the duress defense would not absolve Frost of one, and possibly two, of the robberies.

In his rebuttal, the prosecutor pounced on the failure of defense counsel to argue that the State hadn't proven the elements of the crime, calling it "noticeably absent," and saying:

> Because if Mr. Stimmel had pointed you to the law and pointed to the elements of the offenses and he pointed to the firearm instruction and made his argument you would realize that his argument is phoney, his arguments don't

> match up with what the law is and that is really what we are here for.

The jury convicted Frost of all charges except for one assault. The court sentenced him to almost 55 years in prison. The Washington Court of Appeals affirmed Frost's convictions. *State v. Frost*, 128 Wash. App. 1026 (2005) (unpublished).

The Washington Supreme Court narrowly affirmed on different grounds. *State v. Frost*, 161 P.3d 361, 364 (Wash. 2007) (en banc). The court held that the trial judge misinterpreted its precedent to preclude Frost from arguing both that the prosecution failed to meet its burden of proof beyond a reasonable doubt and that he acted under duress. *Id.* at 366-67. The court noted that defendants may generally present inconsistent defenses so long as they are supported by evidence. *Id.* at 365. The court found an "evidentiary basis, however slim, for counsel to argue that the State failed to prove Frost participated in each of his accomplices' criminal acts with adequate knowledge of promotion or facilitation." *Id.* at 368. This argument was "best illustrated by the robberies in which Frost was only a driver and remained in the car." *Id.* at 368-69.

By preventing defense counsel from making both of his legitimate arguments in his closing, the court unanimously held, the trial judge violated Frost's Fourteenth Amendment right to due process and Sixth Amendment right to counsel. *Id.* at 365-66, 368-69. "[I]n accordance with due process, the State was required to prove the elements of accomplice liability, beyond a reasonable doubt, as to each offense." *Id.* at 368 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). By preventing defense counsel

from arguing reasonable doubt in closing, the trial judge "lessened the State's burden to some degree" and "infringed upon Frost's due process rights." *Id.* The trial court's "undue limitation on the scope of defense counsel's closing argument" also violated Frost's Sixth Amendment right to counsel under *Herring*, 422 U.S. at 862, which held that a defendant is entitled to closing argument. *Frost*, 161 P.3d at 365-66, 369.

Nonetheless, a bare majority of the court held this error was "not so egregious as to require automatic reversal," *id.* at 370, and found the error harmless, *id.* at 369-71. Four justices dissented, arguing that preventing defense counsel from arguing reasonable doubt was structural error under *Herring*. *Id.* at 371-72 (Sanders, J., dissenting). The Supreme Court denied certiorari. *Frost v. Washington*, 552 U.S. 1145 (2008).

Frost filed a federal habeas petition, which the district court denied. *Frost v. Van Boening*, No. C09-725Z, 2011 WL 486198 (W.D. Wash. Feb. 4, 2011). A divided panel of this court affirmed. *Frost v. Van Boening*, 692 F.3d 924 (9th Cir. 2012). A majority of the non-recused active judges voted to rehear the case *en banc*. *Frost v. Van Boening*, 707 F.3d 1143 (9th Cir. 2013).

II

As the Washington Supreme Court correctly concluded, the state trial court unconstitutionally precluded defense counsel from arguing reasonable doubt, under both *Herring* and *Winship*. The only question is whether these constitutional violations are subject to harmless error analysis.

The Supreme Court has divided constitutional errors into two categories: trial errors, which are subject to harmless error review, and structural errors, which require automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 306-10 (1991). "[M]ost constitutional errors can be harmless." *Id.* at 306; *see also id.* at 306-07 (citing examples of non-structural errors). These errors are deemed trial errors "because the errors 'occurred during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307-08).

In contrast, structural errors "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *Id.* (internal quotation marks and alteration omitted). Structural errors include the denial of counsel of one's choice, *id.* at 150; racial discrimination in grand jury selection, *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); and proceeding before a conflicted or biased judicial officer, *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). *See also Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006) (listing other examples).

Under 28 U.S.C. § 2254 (d)(1), a federal court may "grant a state prisoner's application for a writ of habeas corpus if the state-court adjudication pursuant to which the prisoner is held resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of

the United States." *Howes v. Fields*, ___ U.S. ___, 132 S. Ct. 1181, 1187 (2012) (internal quotation marks omitted). A state court's decision is "contrary to" clearly established Federal law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if it confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Early v. Packer*, 537 U.S. 3, 8 (2002) (internal quotation marks omitted). A decision is an "unreasonable application of" federal law if it ""identifies the correct governing principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case."" *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)).

A

In assessing whether the error in this case is structural, our task is easy because the Supreme Court has determined that *Herring* error is structural. *Herring*, 422 U.S. at 864-65. The Supreme Court reaffirmed this aspect of *Herring* more recently in *Bell v. Cone*, 535 U.S. 685, 696 n.3 (2002), which recognized that *Herring* did not require a showing of prejudice. *Herring* concerned a bench trial where the judge, pursuant to a state law, refused to allow the defense or prosecution to present closing arguments. 422 U.S. at 856. The Supreme Court held that this denial violated Herring's Sixth Amendment right to counsel by denying him the right to "participate fully and fairly in the adversary factfinding process," of which closing argument was a "basic element." *Id.* at 858.

The Court held that "only after all the evidence is in" are the attorneys "in a position to present their respective versions of the case as a whole." *Id.* at 862. "And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id.* (citing *Winship*, 397 U.S. 358). No matter how "open and shut" the prosecution's case may seem, there are "cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict." *Id.* at 863. "And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel." *Id.* For these reasons, we have held that preventing a defendant from arguing a legitimate defense theory constitutes structural error. *United States v. Miguel*, 338 F.3d 995, 1000-03 (9th Cir. 2003); *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000).[1]

The denial of closing argument here was far worse than what occurred in *Herring*. In *Herring* neither the prosecution nor the defense made a closing argument. But in this case, the judge denied Frost one of his defense theories in closing argument, while the prosecution freely argued both that it had met its burden of proof and that Frost had not

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[1] Although our decisions do not constitute "clearly established Federal law" for the purposes of 28 U.S.C. § 2254(d)(1), "[o]ur cases may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is 'clearly established.'" *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000).

established duress. Defense counsel was forced to counter this closing with "one hand tied behind his back." *Frost v. Van Boening*, 692 F.3d at 936 (McKeown, J., dissenting). That denial offended the "adversary system of criminal justice" far more than the equal denial of argument in *Herring*. *See Herring*, 422 U.S. at 862; *cf. United States v. Cronic*, 466 U.S. 648, 659 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.").

Precluding defense counsel from arguing a legitimate defense theory would, by itself, constitute structural error. But there is much more to the problem in this case. As the Supreme Court recognized, the Sixth Amendment violation in *Herring* was intertwined with the requirement under the Due Process Clause that the prosecution prove all the elements of an offense beyond a reasonable doubt, as recognized in *Winship*. *See Herring*, 422 U.S. at 862 (citing *Winship*, 397 U.S. 358). In *Winship*, the Supreme Court held that the Due Process Clause requires the prosecution in a criminal proceeding to prove all elements of the crime beyond a reasonable doubt. 397 U.S. at 364. As the Court explained, "[t]he standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Thus, due process requires that "each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, ___ U.S.

___, 133 S. Ct. 2151, 2156 (2013). Simply put, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

As the Court recognized in *Herring*, the primary purpose of a defendant's closing is to hold the State to its burden of proof. *See* 422 U.S. at 862 ("[C]losing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.").

Here, Frost wanted to argue that the State had not satisfied its burden of proving beyond a reasonable doubt that his actions satisfied the elements of accomplice liability. But he was deprived of the fundamental "right to demand that a jury find him guilty of all the elements of the crime." *Gaudin*, 515 U.S. at 511. Instead, to the contrary, the trial court instructed defense counsel that "[y]ou must admit the elements of the offense have been proved before you can use the duress [defense]." While defense counsel was prohibited from making a reasonable doubt argument, the State was given an unfettered opportunity to argue that it had proved its case beyond reasonable doubt. And the State took full advantage of that opportunity. By forcing defense counsel to concede his client's guilt, the trial court struck at the fundamental presumption of innocence.

Not only did the trial court's action deprive Frost of his right to "insist that his guilt be established beyond a reasonable doubt," *Herrera v. Collins*, 506 U.S. 390, 398 (1993), it was tantamount to a directed verdict on guilt. It is axiomatic that a

judge "may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *accord United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408 (1947); *Sparf v. United States*, 156 U.S. 51, 105 (1895). In determining whether the trial court's action constituted a directed verdict, we look to the ruling's effect, not its form. *Cf. Martin Linen Supply Co.*, 430 U.S. at 571 (noting that, rather than looking strictly at the form of the ruling, "we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged"). The record of this case leaves little doubt that the trial judge's actions took the question of reasonable doubt away from the jury.

Winship further teaches that a defendant cannot constitutionally be tried using a lesser burden of proof. 397 U.S. at 364-65. Due process does not permit shifting the burden of proof to the defendant by the use of conclusive or burden-shifting presumptions. *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975). By requiring defense counsel to concede his client's guilt before arguing his affirmative defense, the trial court relieved the State of its burden of proving guilt beyond a reasonable doubt and shifted the burden of proof to Frost of proving his duress defense by a preponderance of the evidence. The trial court was explicit on this point. It instructed that once "the defense says [the crime] is proved . . . that is when you get an opportunity to raise this affirmative defense and prove it by a preponderance." The case was impermissibly and

unconstitutionally tried to the jury with the burden of proof on Frost.[2]

In sum, there is no question that the trial court violated Frost's due process rights under a long line of clearly established Supreme Court precedent. The trial court unconstitutionally violated Frost's right to closing argument under *Herring*. Frost was deprived of his right to demand that a jury find him guilty of all the elements of the crime with which he is charged under *Winship* and *Gaudin*. The trial court's actions in forcing defense counsel to concede guilt amounted to an unconstitutional directed verdict under *Sullivan* and *Martin Linen Supply Co.* The burden of proof was unconstitutionally shifted to Frost in violation of *Winship* and *Mullaney*. These types of errors strike at the heart of the presumption of innocence and the defendant's right to contest that the State prove its case beyond a reasonable doubt. If the presumption of innocence is missing from a trial, then there has been no jury verdict within the meaning of the Sixth Amendment. *Sullivan*, 508 U.S. at 278. Theses types of errors are unquestionably structural under *Herring*, *Winship*, and *Sullivan*.

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[2] The dissent argues that "the judge presented a choice to Frost as opposed to handing down a prohibition or mandate." This is material, according to the dissent, because "had Frost unwisely pursued his failure-of-proof argument in lieu of his duress defense, these ancillary constitutional issues . would be deprived of their supporting role." If it were a choice, it was a Hobson's choice, the result of which allowed the burden of proof to be shifted to Frost. The judge forced Frost to abandon one of his two defense theories, and that restriction resulted in structural errors beyond the *Herring* error, regardless of how the restriction is labeled and regardless of the fact that Frost could have chosen differently.

B

Against this long line of Supreme Court precedent, the State still insists that precluding defense counsel from arguing reasonable doubt is a mere trial error, subject to harmless error analysis. The State relies on *Herring*'s unremarkable observation that trial courts have "great latitude in controlling the duration and limiting the scope of closing summations." 422 U.S. at 862. The State, however, ignores the import of that passage in *Herring*. *Herring* quite reasonably distinguished reasonable restrictions on closing argument from unconstitutional denials of closing argument. Reasonable restrictions on closing argument do not constitute error at all, much less constitutional error. Total preclusion of argument is constitutional error, which *Herring* instructs is structural error. In short, if there is *Herring* error, the error is structural. Absent *Herring* error, there is either no error at all or trial error subject to a harmlessness inquiry. The Court in *Herring* did not create some intermediate category of *Herring* error subject to harmless error analysis.

The error here was undoubtedly a *Herring* error despite the dissent's contention that the "complete denial of closing argument at issue in *Herring* cannot be equated with the limitations on closing argument imposed in Frost's trial." The dissent characterizes the error as a mere limitation on the scope of Frost's closing argument when in fact it was an absolute preemption of one of his factually supported, legally available defense theories. Finding *Herring* error here does not, as the dissent argues, amount to an "expansive interpretation of *Herring*" and does not "infer a broader rule from

Herring." The error here amounted to a total denial of closing argument on a legitimate defense theory and is thus squarely within the *Herring* rule. Likewise, finding *Herring* error here does not create the "substantial negative consequences" presented by the dissent, where this was not a discretionary limitation of closing argument.

Indeed, the Washington Supreme Court did not leave us in doubt as to what type of error was involved in this case. It explicitly held that the error here was *Herring* error, not mere trial error. It unanimously rejected the State's attempt to distinguish *Herring* on the basis that the trial judge was simply exercising his discretion to place legitimate and reasonable limits on closing arguments. Instead, it expressly held that the trial court's limitation on closing argument violated Frost's due process and Sixth Amendment rights. *Frost*, 161 P.3d at 369. Once the Washington Supreme Court correctly determined that the trial judge committed *Herring* and *Winship* error, the error was necessarily structural.

In applying a harmless error review, the Washington Supreme Court majority held that it was "as equipped to assess whether the trial court's mistake in limiting closing argument affected the outcome of this case as it is to conduct other harmless error analyses, such as those regarding an erroneous instruction or evidentiary decision." *Id.* at 370. But this reasoning contradicts *Herring*, which held that no matter how strong the evidence may seem, complete denial of closing argument constitutes structural error. *See* 422 U.S. at 863. And a judge may not functionally direct a verdict for the State, "no matter how overwhelming the

evidence." *Sullivan*, 508 U.S. at 277. By concluding it should conduct a harmless error analysis after finding structural errors, as determined by the Supreme Court in *Herring* and *Winship*, the Washington Supreme Court unreasonably applied clearly established Federal law.

III

The trial court infringed Frost's Sixth and Fourteenth Amendment rights when it precluded his counsel from making a reasonable doubt argument to the jury. Frost was deprived of his right to demand that a jury find him guilty of all the elements of the crime. The trial court's action amounted to a directed verdict of guilty. The burden of proof was unconstitutionally shifted. Frost's right to present a closing argument was violated. These constitutional violations were structural and not subject to harmless error review. We therefore reverse the district court's denial of Frost's habeas petition and remand with instructions for the district court to conditionally grant the writ. We deny as moot all pending motions and decline to expand the certificate of appealability.

REVERSED and REMANDED

Judge TALLMAN, with whom Judges RAWLINSON, BYBEE, CALLAHAN, and M. SMITH join, dissenting:

The United States Supreme Court has never extended its holding in *Herring v. New York*, 422 U.S. 853 (1975), to support the majority's claim of structural error where the affirmative defense of

duress necessarily requires admission of the criminal conduct sought to be excused. There is a fundamental difference between the complete denial of closing argument at issue in *Herring* and the limitations on closing argument imposed in Frost's trial. By declaring structural error in this circumstance, our court once again ignores the Supreme Court's trenchant instructions to exercise restraint in defining clearly established federal law, to grant deference to state courts under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and to find structural error only in rare instances. In light of these oft-repeated directives, we should conclude that the Washington Supreme Court's interpretation of *Herring*, as inapplicable to reverse Frost's convictions, was neither contrary to nor an unreasonable application of clearly established federal law, and that we are compelled under AEDPA to grant deference to the state court's decision. *See Harrington v. Richter*, 131 S. Ct. 770, 785 (2011).

I

The majority's interpretation of *Herring* is not the only reasonable reading of the Court's opinion and, therefore, is not persuasive on AEDPA review. The majority relies on *Herring* to conclude that the trial court's error—restricting Frost's closing argument to permit either a failure-of-proof argument or a duress defense (and not both)—was structural and not subject to harmless-error analysis. That argument misconstrues and unjustifiably extends this Supreme Court precedent. *Herring* simply held that a court's "total denial" of closing argument constituted structural error. *Id.* at 858–59, 863–65. *Herring* is silent on whether an

erroneous limitation requiring a defendant to choose between two incompatible defenses, such as the one imposed by the trial court in this case, is structural error.

In *Herring*, the defendant was denied any opportunity to make a closing argument before judgment was rendered in a criminal bench trial. *Id.* At the conclusion of the bench trial, Herring's counsel asked "to be heard somewhat on the facts." *Id.* at 856. Relying on a New York statute that "confer[red] upon every judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment," *id.* at 853, the judge responded, "I choose not to hear summations," *id.* at 856. The judge then found Herring guilty of the crime charged. *Id.*

The Supreme Court vacated the conviction, holding that the utter denial of closing argument violated Herring's right to counsel. *Id.* at 857–65. The Court concluded that "there can be no justification for a statute that empowers a trial judge to *deny absolutely* the opportunity for *any* closing summation *at all*." *Id.* at 863 (emphasis added). The Supreme Court stated that "[t]here can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial" and that "a total denial of the opportunity for final argument in a nonjury criminal trial" violates the Sixth Amendment. *Id.* at 858–59. As a result, the Court held that denying counsel *any opportunity* to make a closing argument is structural error. *Id.*

In announcing its decision, however, the Court was careful to observe that there is a fundamental difference between a complete denial of closing argument and a limitation on the scope of closing argument. The Court acknowledged what every trial judge knows: that mere limitations on closing arguments do not constitute structural error because "[t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations." *Id.* at 862. This is consistent with longstanding precedent under which we have held that a trial judge has broad discretion to control closing argument. *See United States v. Guess*, 745 F.2d 1286, 1288 (9th Cir. 1984).

The complete denial of closing argument at issue in *Herring* cannot be equated with the limitations on closing argument imposed in Frost's trial. Unlike in *Herring*, the trial judge allowed Frost's counsel to make a closing argument. The judge restricted the scope of that argument, incorrectly requiring counsel to choose between two conflicting defenses, but permitting counsel to argue one. Frost's counsel elected to argue Frost's duress. *Herring* does not compel the conclusion that a court's ruling that restricts the scope of argument, but does not entirely prohibit closing argument, is structural error. Frost's claim requires more than simply applying the rule announced in *Herring* to a different factual scenario. Application of *Herring* to Frost's case inappropriately extends the Supreme Court's holding to a novel legal question that it has never addressed.

II

A

The majority's expansive interpretation of *Herring* cannot be reconciled with the Supreme Court's instructions to only find structural error in rare instances. The Court has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (internal quotation marks omitted). "Only in rare cases has th[e] Court held that an error is structural, and thus requires automatic reversal." *Id.* These "rare cases" involve the complete denial of counsel, a biased trial judge, a defective instruction defining proof beyond a reasonable doubt, denial of self-representation at trial, and racial discrimination in the selection of the grand jury. *Id.* at 218–19 n.2.

The Supreme Court has determined that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Id.* at 218 (internal citations and quotations omitted). The Court has found the following errors to be subject to harmless-error review: jury instructions that misstate an element of the offense; improper comment on defendant's silence at trial in violation of the Fifth Amendment Self-Incrimination Clause; failure to instruct the jury on the presumption of innocence; and failure to give a jury instruction on a lesser included offense in a capital case in violation

of the Due Process Clause. *Arizona v. Fulminante*, 499 U.S. 279, 306–07 (1991).

The Washington Supreme Court correctly concluded that "the error [committed by the trial court] [wa]s not so egregious as to require automatic reversal" and was comparable to the errors that the Supreme Court has previously found harmless. *State v. Frost*, 161 P.3d 361, 370 (Wash. 2007) (en banc). The error "occurred during the presentation of the case to the jury, and [could] therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [it] was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307–08. Reviewing the record as a whole, the Washington Supreme Court correctly concluded that the error committed in Frost's case was of similar magnitude and impact as other constitutional violations found by the United States Supreme Court to be harmless.

In the absence of a United States Supreme Court opinion holding that partial restrictions on closing argument amount to structural error, and in light of the Court's precedent that most errors are subject to harmless-error review, the Washington Supreme Court's conclusion that the error identified by Frost was harmless was not objectively unreasonable. In holding that it was, the majority not only fails to grant appropriate deference as required by AEDPA, but it also ignores the Supreme Court's admonition to find structural error only in rare and limited circumstances. When it elected to extrapolate a novel rule from *Herring* that was neither considered nor addressed by the Supreme Court, the majority failed to heed the Supreme

Court's warning that constitutional errors are strongly presumed to be harmless.

B

The majority concludes that we must infer a broader rule from *Herring*—that structural error also occurs when a trial court limits the scope of closing argument, prohibiting a defendant from arguing a defense or claim but permitting closing argument on the primary defense theory. But the Supreme Court has repeatedly admonished us not to infer extensions from the rules identified in its opinions. *See, e.g.*, *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam); *Richter*, 131 S. Ct. at 785.

The fact that a rule might be necessarily implied from a Supreme Court decision is insufficient to show that the rule is clearly established federal law under AEDPA. *See, e.g.*, *Wright v. Van Patten*, 552 U.S. 120, 124–26 (2008) (per curiam) (holding that no prior Supreme Court decision provided a "categorical answer" to the question of whether prejudice may be presumed when defense counsel participated in a plea hearing by telephone, stating "[b]ecause our cases give no clear answer to the question presented . . . it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law"); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (per curiam) ("[I]t is clear that [a defendant's right to self-representation under] *Faretta* does not, as § 2254(d)(1) requires, 'clearly establis[h]' the law library access right[;] [i]n fact, *Faretta* says nothing about any specific legal aid that the State owes a *pro se* criminal defendant.").

In *Jackson*, the Supreme Court unanimously reversed us for extending the rules announced in its

opinions. 133 S. Ct. at 1990–94. The three-judge *Jackson* panel had relied upon "Supreme Court decisions holding that various restrictions on a defendant's ability to *cross-examine* witnesses violate the Confrontation Clause of the Sixth Amendment." *Id.* at 1994 (emphasis in original). The panel then inferred from these cases the specific rule that "the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." *Id.* (emphasis in original).

Our *Jackson* panel made this leap in logic, "elid[ing] the distinction between cross-examination and extrinsic evidence by characterizing the cases as recognizing a broad right to present 'evidence bearing on [a witness'] credibility.'" *Id.* (second alteration in original). In reversing that opinion, the Supreme Court pointedly stated that "[b]y framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'" *Id.*

The majority repeats the same mistake committed by our *Jackson* panel. It has extended the narrow holding in *Herring* to find structural error where a defendant is prevented from arguing in closing one of several inconsistent defense theories. It does this despite the fact that the Court has repeatedly and expressly instructed us to exercise restraint when defining clearly established federal law—an instruction that the majority all too readily ignores. *See, e.g.*, *Richter*, 131 S. Ct. at 785; *see also Williams v. Taylor*, 529 U.S. 362, 385–86 (2000) (stating that AEDPA created a "'mood' that the Federal Judiciary must respect" in that "federal

judges [should] attend with the utmost care to state-court decisions . . . before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ").

AEDPA deference requires that a claim be based upon a Supreme Court decision that existed at the time of the state court adjudication. The Washington Supreme Court correctly concluded that the United States Supreme Court's decision in *Herring* did not extend to restrictions on closing argument that fall short of outright prohibitions. We should abide by the AEDPA statutory restriction and accord Washington's highest court the comity that Congress and the Supreme Court require.

C

The logical extension of the majority's rule would be to declare structural error and require automatic reversal any time a trial judge erred in placing limits on closing argument because petitioner could argue that, as to the contested issue, the limitation resulted in a total denial of closing argument on a legitimate defense theory. This result is apparent when you look below the surface of the majority's all-or-nothing argument, which amounts to stating, "If you don't like your closing argument and can find any error, no matter how small, we won't hold you to your conviction." This logic would require convictions to be vacated and new trials granted on a number of lesser errors, which may now be deemed structural.

For example, if structural error is found in this case, how could we say that structural error does not also occur when a trial judge improperly excludes

exculpatory evidence without regard to materiality and forbids defense counsel from commenting on it in closing? In both instances, the defendant is prohibited from effectively claiming innocence and from comprehensively arguing all theories that support that defense. Structural error may also be found when a trial judge improperly restricts closing argument by imposing time limitations that necessarily require the defense to choose among multiple arguments to emphasize during summation. Claims of structural error may also be made when a judge adopts any number of limitations that inhibit defense counsel from making their most effective and comprehensive arguments supporting a defendant's innocence without regard to any evidence supporting the claim or the context from which the argument is to be made. That cannot be the law and the Supreme Court has never said anything of the sort.

There are substantial negative consequences to interpreting the Supreme Court's decision in *Herring* expansively and increasing the number of errors deemed structural. Doing so eliminates any need to establish prejudice to show that the defendant was deprived of a fair trial. The majority's interpretation, and its undeniable effect, cannot be reconciled with our limited role in habeas proceedings involving review of state convictions under AEDPA.

III

The majority cites to two Ninth Circuit cases, *Conde v. Henry*, 198 F.3d 734 (9th Cir. 1999), and *United States v. Miguel*, 338 F.3d 995 (9th Cir. 2003), to conclude "that preventing a defendant from arguing a legitimate defense theory constitutes

structural error." The majority's reliance on these cases is in error. As the district court held, "Circuit case law is not clearly established federal law as determined by the Supreme Court and is not, alone, a basis for the Court to grant habeas relief." *See Renico v. Lett*, 559 U.S. 766, 779 (2010) (stating that a decision of the court of appeals "does not constitute clearly established Federal law, as determined by the Supreme Court, § 2254(d)(1), so any failure to apply that decision cannot independently authorize habeas relief under AEDPA." (internal quotation marks omitted)); *see also Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam) (stating that "circuit precedent does not constitute clearly established Federal law," and it "cannot form the basis for habeas relief under AEDPA"). Consequently, our decisions in *Conde* and *Miguel* are insufficient to find that the Washington Supreme Court's decision—that the trial court's error was not structural—was contrary to, or an unreasonable application of, clearly established federal law.

Furthermore, even if *Conde* or *Miguel* were instructive in defining clearly established federal law, both cases are distinguishable. Importantly, neither case involved a petitioner seeking habeas relief post-AEDPA, so neither case bound our court to AEDPA's deferential review standards on appeal. On federal habeas review, we must uphold the Washington Supreme Court's adjudication of Frost's claim unless we conclude that its interpretation limiting the extension of *Herring* was objectively unreasonable, and not merely because we would have reached a contrary interpretation. *See Renico*, 559 U.S. at 776 ("AEDPA authorizes federal courts to

grant relief only when state courts act *unreasonably*.").

In *Conde*, a pre-AEDPA habeas appeal, we concluded that structural error occurred because "the trial court improperly precluded Conde's attorney from making closing argument explaining the defendant's theory of the case, it refused to instruct the jury on the defendant's theory, and, over the defendant's objection, it gave jury instructions that did not require that the jury find every element of the offense." 198 F.3d at 741. "Together," we found, "these errors deprived the petitioner of effective assistance of counsel, due process and trial by jury on every element of the charged crime." *Id.*

In *Miguel*, a direct appeal from a federal criminal proceeding, we held that structural error occurred when the district court precluded defense counsel from arguing during closing that someone other than the defendant shot the victim and that no evidence supported the defense theory. 338 F.3d at 1000–01. Although we cited to *Herring* in so ruling, our decision in *Miguel* insufficiently establishes under AEDPA that the Washington Supreme Court's determination in this case was contrary to, or an unreasonable application of, clearly established federal law.

Here, after he had taken the stand and admitted to participating in an eleven-day crime spree, Frost was permitted to argue during closing argument that he committed the crimes under duress—the primary defense theory in his case. Further, as the Washington Supreme Court and the district court highlighted, "[t]he record clearly shows the prosecutor argued it was the state's burden to

prove that Frost was an accomplice and to prove beyond a reasonable doubt each and every element of the charged offenses." *Frost v. Van Boening*, No. C09-725-TSZ-BAT, 2010 WL 5775657, at *8 (W.D. Wash. Oct. 5, 2010) (adopted by *Frost v. Van Boening*, No. C09-725Z, 2011 WL 486198 (W.D. Wash. Feb. 4, 2011)); *see Frost*, 161 P.3d at 364 ("In closing, the prosecutor repeatedly mentioned the State's burden of proof as to Frost's robbery offenses. Likewise, the jury was properly instructed on the State's burden of proof in general, as well as the requirements to prove accomplice liability in particular." (internal citation omitted)). Thus, the jury received ample instruction on the cardinal principles of criminal law and it was properly equipped to apply the facts, as it found them, to the legal framework.

By relying on circuit precedent to find structural error, the majority also ignores the Supreme Court's recent admonition in *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam). In reversing us in *Marshall*, the Court noted that our opinion "rested in part on the mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Id.* at 1450. It reiterated that in reviewing habeas petitions we "may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct." *Id.* at 1451.

This is precisely the tactic that the majority has employed to grant Frost's habeas petition. Given our limited review under AEDPA, our decisions in

Conde and *Miguel* do not establish that the Washington Supreme Court's decision to apply harmless-error review was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. Absent such a showing, under AEDPA we must defer to the state court's decision.

IV

The majority also bends the facts of the case in its favor by framing a choice as a mandate. The majority asserts that the judge "specifically prohibited counsel from arguing that the State had not met its burden of proof" and that "defense counsel was precluded from arguing reasonable doubt." But that is incorrect. The trial judge repeatedly indicated that Frost was free to assert that the prosecution had not proved accomplice liability. But the judge also noted, albeit in error, that such a choice would have consequences, informing Frost that "[i]f he [argued failure of proof during closing,] the duress instruction will come out of the case." By requiring Frost to "opt for one [theory] or the other," the judge presented a choice to Frost as opposed to handing down a prohibition or mandate. And, although the judge may have hinted at his belief that abandoning the duress defense and electing to argue that the prosecution had not satisfied its burden of proof would be unwise, the judge did not usurp Frost's choice.[1]

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[1] The majority asserts that any choice Frost had "was a Hobson's choice, the result of which allowed the burden of proof to be shifted to Frost." But a Hobson's choice, which requires selection between something or nothing, is only present here if we view Frost as being forced to choose between pursuing an

This is material to the analysis because the majority finds support for its structural-error conclusion based on Frost's actions instead of the judge's. The majority concludes that by "depriv[ing] Frost of his right to 'insist that his guilt be established beyond a reasonable doubt,'" the trial judge essentially entered a "directed verdict on guilt." Relying on Supreme Court cases that instruct both (1) that a defendant cannot constitutionally be tried under a lesser burden of proof and (2) that due process prevents a state from shifting the burden of proof to the defendant, the majority concludes that "the trial judge's actions took the question of reasonable doubt away from the jury" such that the "case was impermissibly and unconstitutionally tried to the jury with the burden of proof on Frost." But this overlooks Frost's role. After all, had Frost unwisely pursued his failure-of-proof argument in lieu of his duress defense, these ancillary constitutional issues that the majority leans on would be deprived of their supporting role.

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affirmative duress defense or mounting no defense at all. This may be true given that Frost had already thrice confessed and then testified to participating in the crimes, but if so, any Hobson's choice was of his own making. As opposed to a Hobson's choice, Frost's predicament is more akin to "Morton's Fork." *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 623 n.13 (2d Cir. 1982) (describing "Morton's Fork" in the context of a different legal dispute). The trial court erroneously made Frost choose between two theoretically opposite tines, both of which led to an equally undesirable outcome—conviction. Upon cry of "error," and at the public's expense, the majority suspends reality and charts Frost a new course around both Scylla and Charybdis. AEDPA prevents such safe passage when the resulting shipwreck was inevitable.

V

AEDPA mandates that "a state prisoner seeking a writ of habeas corpus from a federal court 'must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011) (per curiam) (quoting *Richter*, 131 S. Ct. at 786–87). In the absence of a Supreme Court holding that the error in this case was structural error—and in light of the Court's recurring precedent that most errors are subject to harmless-error analysis and that clearly established federal law must be interpreted narrowly—the Washington Supreme Court's conclusion that harmless error applies here was not objectively unreasonable.

AEDPA does not permit us to reject a state court's interpretation of Supreme Court precedent simply because we disagree. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). In *Lockyer*, the Supreme Court reversed our decision to grant habeas relief, explaining:

> It is not enough that a federal habeas court, in its "independent review of the legal question," is left with a "firm conviction" that the state court was "erroneous." We have held precisely the opposite: "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established

> federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Rather, that application must be objectively unreasonable. *Id.* at 409; *Bell v. Cone*, 535 U.S. 685, 699 (2002); *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (per curiam).

Id. at 75–76 (selected internal citations and quotation marks omitted); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.").

Because the Supreme Court has never addressed a claim, such as the one presently before us, concerning a restriction on the scope of closing argument, the Washington Supreme Court's determination that the error was not structural does not require automatic reversal. *See Richter*, 131 S. Ct. at 786 ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (alteration in original))).

The Supreme Court's decision in *Herring* did not "establish a legal principle that *clearly extends*" to limitations imposed on closing arguments, as opposed to the complete denial of argument. *Moses v. Payne*, 555 F.3d 742, 754 (9th Cir. 2009) (emphasis added). Indeed, the Washington Supreme Court was able to "draw a principled distinction between the case before it and Supreme Court case law," and we are bound under AEDPA to defer to the state court's

reasoned opinion. *Murdoch v. Castro*, 609 F.3d 983, 991 (9th Cir. 2010) (en banc); *see also Van Patten*, 552 U.S. at 124–26.

VI

The Washington Supreme Court properly concluded that the trial court's error was harmless. On habeas review, to determine whether Frost is entitled to relief, our analysis is focused on whether the trial court's restriction on Frost's closing argument "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

Under this standard, Frost is "not entitled to habeas relief based on trial error unless [he] can establish that it resulted in 'actual prejudice.'" *Id.* (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). We should hold that, "[i]n light of the record as a whole," the trial court's limitation on defense counsel's closing argument did not have a "substantial and injurious effect or influence in determining the jury's verdict" for several reasons. *Id.* at 638 (internal quotation marks omitted). That is what the Washington Supreme Court ultimately, and correctly, decided. *See Frost*, 161 P.3d at 364.

First, the evidence of Frost's guilt at trial was overwhelming. Frost gave three taped confessions, all of which were entered into evidence at trial. Further, Frost testified in detail about his involvement in the crimes for which he was charged as an accomplice, admitting that: (1) he drove Williams to the Gapp residence on the night of the robbery, that he entered the residence, and removed money and guns from Gapp's safe; (2) he drove the

co-defendants to the Taco Time restaurant, T and A video store, the 7-Eleven convenience store, and Ronnie's Market on the night that each of those robberies took place; (3) he was aware that Williams carried a bag containing such items as a ski mask and gloves that were routinely used to commit the crimes; and (4) he was aware of his co-defendant's use of firearms. Finally, Detective Broggi's testimony regarding the loaded guns, cash register, bank bags, safe, and ski masks that were found at Frost's home further corroborated Frost's active role in the crimes.

Second, Frost conceded guilt as to some of these crimes when he testified in his own defense before the trial court erroneously restricted Frost's closing argument. During opening statements, Frost's counsel admitted that Frost committed at least one of the robberies, stating, "You will find from the evidence . . . that Joshua Frost is guilty of the robbery of [the elderly couple]." Consistent with his counsel's statements, Frost told the jury that he participated in the charged crimes but claimed that he did so under duress.

Third, as to the remaining offenses, the state's burden of proof did not go untested because defense counsel was barred from raising reasonable doubt as to accomplice liability. Although Frost's counsel admitted during closing argument that Frost was guilty of accomplice liability on certain counts, he also argued that the state had failed to meet its burden of proof on others. Specifically, Frost's counsel argued:

> I think you can find Joshua Frost guilty of the Gapp robbery because that is just so

> overpowering, and he did go into the house. I think you can find Joshua Frost guilty of the T and A robbery not because he went in to do the robbery but because he actually entered the store. And the only reason I think you could find him guilty of that is that it is kind of just too much to ask for somebody who is willing to take the step to let him off. And I know that is what you are thinking, some of you. But as to the cases in which he didn't go in anywhere and was just told to stay put, we are asking you to find him not guilty, and even if you find him guilty he is not guilty of the guns. You can find him guilty of displaying the gun as an accomplice, I suppose, which is one of the things you have to find to make a robbery in the first degree. But that doesn't require you to find the special verdict firearm allegation in addition. You don't have to do that. And we hope you don't. And we think that the basis for not doing that is that the guns were out of his control.

Accordingly, as the district court acknowledged, "contrary to Frost's contention, the record shows defense counsel was able to and did argue the state had failed to prove Frost was an accomplice."

Fourth, the jury was fully informed of the state's burden to prove each element of the crime beyond a reasonable doubt, including accomplice liability. For example, the prosecutor in closing argument stated:

> Now I have divided my closing argument into two different parts. The reason for that, ladies and gentlemen, is there really are two parts in

> some ways you look at this. The first part has to do with the charges and the evidence and has the state proven all of the elements and all of the crimes beyond a reasonable doubt. And then the second part has to do with the defense of duress, and this is important because the first part, again, the state has the burden. To get to duress you really have to find the state proves its case beyond a reasonable doubt . . .

Additionally, the jury in Frost's trial was properly instructed as to the state's burden of proof by the judge prior to opening statements, by the prosecution in closing, and in the formal jury instructions read before the jury rendered its verdict.

Finally, Frost voluntarily elected to concede his involvement in the robberies when he decided to pursue the inconsistent defense of duress. Under Washington law, a defendant must admit that he "participated in the crime" in order to argue duress. Wash. Rev. Code § 9A.16.060(1)(a). As the Washington Supreme Court explained, "a defense of duress *admits* that the defendant committed the unlawful act, but pleads an excuse for doing so . . . [and] a duress defense necessarily allows for no doubt that the defendant did the acts charged." *State v. Riker*, 869 P.2d 43, 52 (Wash. 1994) (emphasis in original).

Therefore, although the Washington Supreme Court found that the trial court erred when it required Frost to concede guilt or criminal liability, by electing to raise a duress argument, Frost necessarily had to admit that he committed the unlawful acts, and he consequently knew that any

argument he made regarding the state's failure to prove guilt was significantly weakened. Although the trial judge indisputably erred in prohibiting defense counsel from arguing innocence, the magnitude of that error is certainly lessened by the fact that Frost voluntarily admitted his involvement in each of the charged crimes by acknowledging his commission of them under oath while pursuing a duress defense.

Thus, in light of our review of the record, we should hold that the trial court's limitation on defense counsel's closing argument did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. There may be circumstances where a trial court's limitation on closing arguments may not survive the *Brecht* harmless-error analysis. That is not the case here. Consequently, because Frost did not establish "actual prejudice," we should conclude that he is not entitled to habeas relief. *Id.*

VII

The Washington Supreme Court's decision that the trial court's restriction on closing argument did not constitute structural error was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. In light of the Supreme Court's express instructions to exercise restraint in defining clearly established federal law, to grant deference to state courts under AEDPA, and to find structural error only in rare instances, the Washington Supreme Court's decision to apply harmless-error analysis should have been respected.

The Washington Supreme Court properly concluded that the trial court's error was harmless. Reviewing the record as a whole, the trial court's restriction on Frost's closing argument did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. The record demonstrates that Frost was afforded the opportunity to present his primary defense—duress—and the state was not relieved of its burden to prove Frost guilty beyond a reasonable doubt. Because the Washington Supreme Court's decision is neither contrary to nor an unreasonable application of Supreme Court law as set forth in *Herring*, Frost is not entitled to habeas relief.

I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA JAMES FROST, *Petitioner-Appellant,* v. RON VAN BOENING, Superintendent, *Respondent-Appellee.*	No. 11-35114 D.C. No. 2:09-cv-00725-TSZ OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, Senior District Judge, Presiding

Argued and Submitted
December 8, 2011--Seattle, Washington

Filed August 22, 2012

Before: Ralph B. Guy, Jr.,* M. Margaret McKeown,
and
Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman;
Dissent by Judge McKeown

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* The Honorable Ralph B. Guy, Jr., Senior Circuit Judge for the Sixth Circuit, sitting by designation.

COUNSEL

Erik Levin, Assistant Federal Public Defender, Office of the Federal Public Defender, Seattle, Washington, for petitioner-appellant Joshua Frost.

Robert McKenna, Attorney General, and John J. Samson, Assistant Attorney General, Olympia, Washington, for respondent-appellee Ron Van Boening.

OPINION

TALLMAN, Circuit Judge:

We evaluate on federal habeas review the Washington Supreme Court's decision to apply harmless error review over structural error analysis where the trial court prohibited defense counsel from arguing during closing argument both that the State failed to meet its burden of proof establishing accomplice liability and that a criminal defendant acted under duress. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

On December 17, 2003, Washington state prisoner Joshua Frost ("Frost") was found guilty following a jury trial of first degree robbery, first degree burglary, second degree assault, and attempted robbery. The Superior Court of Washington for King County imposed a sentence of 657 months.

Frost appealed his jury conviction to the Washington Court of Appeals, which affirmed the trial court. He subsequently appealed that decision to the

Washington Supreme Court. Frost presented a number of issues on appeal. The Washington Supreme Court exercised its power of discretionary review and limited his appeal to whether the trial court abused its discretion and violated Frost's constitutional right to counsel and a fair trial by prohibiting Frost's counsel from arguing reasonable doubt as to accomplice liability in closing argument while simultaneously arguing the affirmative defense of duress. The Washington Supreme Court affirmed Frost's judgment and sentence but held that although the trial court had abused its discretion by "unduly limit[ing] the scope of Frost's counsel's closing argument" due to its misreading of prior precedent, the trial court's error was nonetheless harmless.[1] The mandate issued on July 25, 2007. The United States Supreme Court denied certiorari on January 14, 2008. *Frost v. Washington*, 552 U.S. 1145 (2008).

In May 2009, after two unsuccessful rounds of collateral state habeas litigation (called "personal restraint petitions" in Washington), Frost filed a habeas corpus petition in the United States District Court for the Western District of Washington. In June 2009, the district court stayed the habeas petition to allow Frost the opportunity to pursue his third and last personal restraint petition in the Washington Supreme Court. Following the Washington Supreme

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[1] The trial court had relied on its understanding of *State v. Riker*, 869 P.2d 43 (Wash. 1994), which held that "duress is an affirmative defense that the defendant must prove by a preponderance of the evidence" and stated "'a defense of duress *admits* that the defendant committed the unlawful act, but pleads an excuse for doing so.'" *State v. Frost*, 161 P.3d 361, 366-67 (Wash. 2007) (quoting *Riker*, 869 P.2d at 52) (emphasis in original).

Court's decision to deny that petition as time-barred, the district court lifted the stay on February 18, 2010.

Frost filed an amended habeas corpus petition--the subject of this appeal--on February 26, 2010. Frost raised a number of grounds for relief on appeal, including that the trial court violated his Fourteenth Amendment due process rights and Sixth Amendment right to counsel by prohibiting trial counsel from arguing simultaneously in closing argument that the State failed to prove beyond a reasonable doubt that Frost was an accomplice and Frost's duress defense.

On October 5, 2010, United States Magistrate Judge Brian A. Tsuchida issued a Report and Recommendation, concluding that the district court should deny the amended habeas petition.[2] The Report and Recommendation did not address the

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[2] Frost--for obvious reasons--does not challenge the Washington Supreme Court's unanimous decision that the trial court violated his Sixth Amendment right to counsel and Fourteenth Amendment right to due process when it prohibited him from simultaneously arguing both duress and reasonable doubt in closing argument. The State, however, asserts for the first time on appeal that the trial court's restriction of Frost's closing argument did not amount to a constitutional violation and that the Washington Supreme Court's decision in so holding was erroneous and contrary to, or an unreasonable application of federal law. We need not decide whether the restriction on Frost's closing argument violated his Sixth Amendment right to counsel and his Fourteenth Amendment due process rights because Frost was not prejudiced under the test set forth by *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). As a result, we assume without deciding that the trial court's restriction on closing argument amounted to constitutional error and only analyze whether, under federal habeas review, that decision amounts to harmless error under *Brecht*.

Washington Supreme Court's holding that the trial court abused its discretion by limiting the scope of the defense's closing argument because the State failed to challenge that determination. Consequently, as to the issue presently before us, the Report and Recommendation only addressed whether the Washington Supreme Court reasonably determined that the trial court's error was subject to harmless error analysis. It concluded that the Washington Supreme Court reasonably determined that the error was subject to harmless--not structural--error analysis.

United States District Judge Thomas S. Zilly adopted the Report and Recommendation and dismissed the habeas petition with prejudice. The district court granted a certificate of appealability as to Frost's claim that the restriction on closing argument violated due process and his right to counsel, but denied issuing a certificate of appealability as to Frost's remaining claims.[3] Frost timely appealed.

The pertinent facts regarding Frost's involvement in the robberies, burglaries, and other related crimes, as summarized by the Washington Supreme Court, are as follows:

> Frost's criminal conduct involved five discrete incidents over 11 days. First, on April

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[3] We do not address the uncertified issues of Frost's appeal. *See Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) (stating that to obtain a Certificate of Appealability on a claim, "[a] habeas petitioner's assertion . must make a 'substantial showing of the denial of a constitutional right.' " (quoting 28 U.S.C. § 2253 (c)(2)). Having considered Frost's arguments, we are satisfied that none of his other claims meet the standard.

8, 2003, Frost, together with accomplices Matthew Williams and Alexander Shelton, robbed and burglarized the home of Lloyd and Verna Gapp. Frost acted as the driver and also entered the home with Williams and Shelton. Firearms were used.

On April 12, 2003, Frost acted as the driver for Shelton and Williams, who robbed a Taco Time restaurant while armed with firearms. Then on April 15, 2003, Frost, Williams, Shelton, and another man participated in the robbery of T and A Video. Frost again acted as the driver and also performed surveillance of the video store prior to the robbery. On April 17, 2003, Frost acted as the driver for Williams and Shelton, who robbed a 7/Eleven store at gunpoint. During this robbery, one accomplice threatened two customers in the store's parking lot with a gun. Immediately following this robbery, Frost drove Williams and Shelton to Ronnie's Market, which they also robbed using firearms. During the course of this robbery, employee Heng Chen was shot in the hand.

Frost, Williams, and Shelton were arrested on April 20, 2003. Several firearms, a cash register, safes, bank bags, and ski masks associated with the above offenses were found inside Frost's home. Frost made multiple confessions to the police regarding the above offenses, recordings of which were introduced at trial. Ultimately, Frost was charged with six counts of robbery, one count of burglary, one count of attempted robbery, and three counts of

> assault; most charges included firearms enhancements.
>
> Prior to trial, Frost moved to suppress his statements to the police; the court denied his motion and admitted the confessions. Frost testified at trial. He generally admitted participating in the robberies but claimed he acted under duress.

Frost, 161 P.3d at 364.

At trial, Frost testified that he felt forced to participate in the robberies because he was concerned that if he refused to do so, Williams would harm him, his mother, and brother. As a result, Frost's counsel informed the court that he intended to argue during closing argument both that the State failed to meet its burden as to accomplice liability and that Frost (if found to have been an accomplice) acted under duress in committing the charged robbery offenses. In response to the State's objection, citing *Riker*, 869 P.2d at 43, the trial court ruled that defense counsel could not argue both theories in closing. The court announced that if Frost's counsel argued the State had failed to meet its burden of proof as to any of the robbery offenses, the court would not instruct the jury on duress as to those offenses. Specifically, the court stated:

> You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. *Riker* is very clear on this. You must admit the elements of the offense have been proved before you can use the duress offense.

Defense counsel objected to the court's ruling and in response to the court's instructions asked, "[b]ut am I

not permitted to argue in the alternative, using duress and failure to prove the alternative?" "No," the court responded. "Duress is an affirmative defense. To quote *Riker*, a defense of duress admits that the defendant committed the unlawful act but pleads an excuse for doing so. You may not argue both."

In compliance with the court's ruling, defense counsel generally limited his argument to the affirmative defense of duress. As the Washington Supreme Court noted, however, the prosecutor acknowledged the State's burden of proof beyond a reasonable doubt during closing argument as to each of Frost's robbery offenses. The jury was also instructed on the State's burden of proof as to each element of the crimes charged, as well as the requirements to prove accomplice liability.

II

We review a district court's denial of a habeas petition de novo and the findings of fact for clear error. *Schultz v. Tilton*, 659 F.3d 941, 952 (9th Cir. 2011); *Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007). A determination of a factual issue made by a state court is presumed to be correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Norris v. Morgan*, 622 F.3d 1276, 1294 n.21 (9th Cir. 2010). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

III

A

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs our review of Frost's

habeas petition. 28 U.S.C. § 2254; *Ybarra v. McDaniel*, 656 F.3d 984, 989 (9th Cir. 2011). The provisions of AEDPA "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007). "This is a difficult to meet, and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (internal citation and quotation marks omitted).

"Under AEDPA, we may not grant habeas relief unless the state court proceedings resulted in a decision that was (1) 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;' or (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Ybarra*, 656 F.3d at 989 (quoting 28 U.S.C. § 2254(d)).

B

Frost argues that the Washington Supreme Court erred in failing to declare that the trial court's restriction on Frost's closing argument was structural error. We disagree. The Washington Supreme Court's decision that the trial court's restriction was not structural error is neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

[1] Structural errors "affect the framework within which the trial proceeds," *Pucket v. United States*, 556 U.S. 129, 140 (2009) (internal citation and quotation marks omitted), are rare, and require automatic reversal. *Washington v. Recuenco*, 548 U.S.

212, 218 (2006). The Supreme Court has found the existence of structural errors in very limited circumstances. *Id.* at 218-19 n.2 (listing circumstances the Supreme Court has held constitute structural error).

[2] Consequently, because the Supreme Court has never addressed in a holding a claim, such as the one presently before us, concerning a restriction on the scope of closing argument, the Washington Supreme Court's determination that the error was not structural does not require automatic reversal. *See Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) ("'[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.' " (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (alteration in original))).

[3] Frost relies on *Herring v. New York*, 422 U.S. 853 (1975), to argue that "[w]here a court prevents the accused from arguing a valid theory of the case in closing argument, such error is structural and not subject to harmless error review." Frost's argument, however, is not persuasive under AEDPA review because *Herring* held that a court's *total* denial of closing argument constituted structural error. *Id.* at 858-59, 863-65. The Supreme Court's decision in *Herring* is silent on whether a limitation, such as the one imposed by the trial court in this case, is structural error.

In *Herring*, the defendant was not permitted to make any closing argument in a criminal bench trial. *Id.* The Supreme Court struck down a New York state statute that "confer[red] upon every judge in a nonjury criminal trial the power to deny counsel any

opportunity to make a summation of the evidence before the rendition of the judgment." *Id.* at 853. The Supreme Court held that "there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for *any* closing summation *at all*." *Id.* at 863 (emphasis added). In so holding, the Supreme Court stated that "[t]here can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial" and that "a *total* denial" of the opportunity for final argument in a nonjury criminal trial violates the Sixth Amendment. *Id.* at 858-59 (emphasis added).

[4] Denying counsel any opportunity to make a closing argument eliminates "a basic element of the adversary fact-finding process in a criminal trial," *id.* at 858, and thereby gives rise to "a structural defect affecting the framework within which the trial proceeds," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The dissent bases its argument on this premise, but like Frost, fails to acknowledge that a rational jurist could conclude that there is a fundamental difference between a complete denial of closing argument and a limitation on the scope of closing argument. It is well established that the trial judge has broad discretion to control closing argument, *see United States v. Guess*, 745 F.2d 1286, 1288 (9th Cir. 1984), and, like the erroneous exclusion of a defendant's testimony regarding the circumstances of his confession, *Crane v. Kentucky*, 476 U.S. 683, 691 (1986), an improper limitation on the content of closing argument "occur[s] during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its

admission was harmless beyond a reasonable doubt," *Fulminante*, 499 U.S. at 310.

[5] Indeed, the Supreme Court in *Herring* explicitly made this distinction. The Court acknowledged that "[t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations," 422 U.S. at 862, but went on to explain that, by contrast, "there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation *at all*," *id.* (emphasis added). Moreover, the Court repeatedly emphasized that the denial in that case was complete. *See, e.g., id.* at 859, 863 ("total denial of the opportunity for final argument;" "the trial judge refused to hear any argument;" "to deny absolutely the opportunity for any closing summation at all;" "total denial of final argument").

[6] In clarifying its holding in *Riker*, it was therefore not unreasonable for the Washington Supreme Court to hold under *Herring* that the error was harmless rather than structural. Frost was not denied the opportunity to make a closing argument--he was afforded the opportunity to argue his defense of duress. But in so doing, his lawyer had to make a choice because under state law one cannot be liable as an accomplice if the defense of duress is established. In the face of the three confessions by Frost, his testimony before the jury admitting his participation in the crimes, and strong corroborative evidence, Frost could not deny he participated in the crime spree. Defense counsel wisely conceded that fact to maintain credibility in urging the jury to nonetheless excuse his client's conduct because he acted under duress. The jury did not buy the defense.

As a result, Frost fails to successfully show that the Washington Supreme Court's holding--that the trial court's error was not structural--is contrary to, or an unreasonable application of federal law under the Supreme Court's decision in *Herring*.

Frost points to two Ninth Circuit cases, *Conde v. Henry*, 198 F.3d 734 (9th Cir. 1999), and *United States v. Miguel*, 338 F.3d 995 (9th Cir. 2003), to argue that the Washington Supreme Court erred in failing to treat the restriction on closing argument as structural error. Frost's reliance on *Conde* and *Miguel* fails.

As the district court held, "circuit law is not clearly established federal law as determined by the Supreme Court and is not, alone, a basis for the Court to grant habeas relief." *See Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010) (stating a court of appeal's decision "does not constitute clearly established Federal law, as determined by the Supreme Court, § 2254(d)(1), so any failure to apply that decision cannot independently authorize habeas relief under AEDPA") (internal quotation marks omitted); *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010) ("[C]learly established law as deter-mined by [the Supreme Court] refers to the holdings, as opposed to the dicta, of [the Supreme Court's decisions]." (alterations in original) (citation omitted)); *but see Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (stating Circuit law "may be persuasive authority for purposes of deter-mining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help [courts of appeals] determine what law is "clearly established") (citation omitted). Consequently, our decisions in *Conde* and *Miguel*, alone, are insufficient to find that the Washington Supreme Court's decision—that the trial court's error

was not structural--was contrary to, or an unreasonable application of, clearly established federal law.

Moreover, even if we were to look to *Conde* and *Miguel* for guidance, these cases are distinguishable from Frost's case. In *Conde*, a pre-AEDPA habeas case, we concluded that structural error occurred because "the trial court improperly precluded Conde's attorney from making closing argument explaining the defendant's theory of the case, it refused to instruct the jury on the defendant's theory of the case, it refused to instruct the jury on the defendant's theory, and, over the defendant's objection, it gave jury instructions that did not require that the jury find every element of the offense." *Conde*, 198 F.3d at 741. "Together," we found, "these errors deprived the petitioner of effective assistance of counsel, due process and trial by jury on every element of the charged crime." *Id.*

Here, Frost was permitted to argue during closing argument his defense of duress--the primary defense theory in his case. Further, as the Washington Supreme Court and the district court highlighted, "[t]he record clearly shows the prosecutor argued it was the state's burden to prove that Frost was an accomplice and to prove beyond a reasonable doubt each and every element of the charged offenses." *Frost v. Van Boening*, No. C09-725-TSZ-BAT, 2010 WL 5775657, at *8 (W.D. Wash. Oct. 5, 2010) (adopted by *Frost v. Van Boening*, No. C09-725Z, 2011 WL 486198 (W.D. Wash. Feb. 4, 2011)); *see Frost*, 161 P.3d at 364 ("In closing, the prosecutor repeatedly mentioned the State's burden of proof as to Frost's robbery offenses. Likewise, the jury was properly instructed on the State's burden of proof in general, as well as the

requirements to prove accomplice liability in particular." (internal citation omitted)). Thus, the jury had ample instruction on the principles of criminal law to which they were to apply the facts they determined.

[7] In *Miguel*, a direct appeal from a federal criminal proceeding, we held that structural error occurred when the district court precluded defendant's counsel from arguing during closing argument at trial that someone other than the defendant shot the victim, and in instructing the jury that no evidence supported the defense theory. *Miguel*, 338 F.3d at 1000-01. Although we cited to *Herring* in so ruling, our decision in *Miguel* insufficiently establishes under AEDPA that the Washington Supreme Court's determination in this case was contrary to, or an unreasonable application of, clearly established federal law.

The dissent relies on *Miguel* but overlooks that *Miguel* involved a direct appeal and that, in comparison, our review under AEDPA is significantly limited. On federal habeas review we must uphold the state court's adjudication of a claim unless the adjudication of that claim "*was contrary to* or involved an *unreasonable* application of clearly established Federal law, *as determined by the Supreme Court*." 28 U.S.C. § 2254(d) (emphasis added).

The logical extension of the dissent's rule would be to declare structural error and automatic reversal any time a trial judge placed limits on closing argument because petitioner could argue that, as to the contested issue, the limitation resulted in a "*total* denial of closing argument on a legitimate theory." Dissent at p.9591. That cannot be the law and the Supreme Court has never said anything of the sort. It

certainly ignores the Court's pronouncement in *Recuenco*, 548 U.S. at 218:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Fulminante*, 499 U.S. at 306). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)).

Fulminante, for example, applied harmless error review to improperly admitted involuntary confessions, which were found to have violated constitutional rights under the Sixth and Fourteenth Amendments, just as the Washington Supreme Court found here.

Further, as we have been reminded, AEDPA does not permit us to reject a state court's interpretation of Supreme Court precedent simply because we disagree. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). In *Lockyer*, the Supreme Court reversed our decision to grant habeas, explaining:

> It is not enough that a federal habeas court, in its "in-dependent review of the legal question," is left with a "firm conviction" that the state court was "erroneous." We have held precisely the opposite: "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its

> independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Rather, that application must be objectively unreasonable. *Id.* at 409; *Bell v. Cone*, 535 U.S. 685, 699 (2002); *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (per curiam).

Id. at 75-76 (some internal citations and quotation marks omitted); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable--a substantially higher threshold.").

[8] Thus, even were we to read *Miguel* and *Conde* as holding that structural error occurs *any* time a court places an improper restriction on defense counsel's summation, we cannot say that such an interpretation is the *only* reasonable reading of *Herring*. "Because AEDPA authorizes federal courts to grant relief only when state courts act *unreasonably*, it follows that the more general the rule at issue--and thus the greater the potential for reasoned disagreement among fair-minded judges--the more leeway state courts have in reaching outcomes in case-by-case determinations." *Renico*, 130 S. Ct. at 1864 (emphasis in original) (internal quotation marks and brackets omitted). Given our limited review, therefore, our decision in *Miguel* does not establish that the Washington Supreme Court's holding applying harmless error involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. Absent such a showing, under AEDPA we must give deference to the

state court's decision that harmless error analysis applies here.

C

Frost argues that even if the trial court's restriction on closing argument was not clearly established structural error, the Washington Supreme Court's decision involved an objectively unreasonable application of the harmless error standard. Our review of the Washington Supreme Court's harmless error determination, however, is limited because the particular legal claim presented, given a finding of a constitutional violation but no prejudice, changes our normal level of deference on federal habeas review. On habeas review, where a constitutional error is found, "a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* . . . ." *Fry v. Pliler*, 551 U.S. 112, 121 (2007) (citing *Brecht*, 507 U.S. at 623). Our analysis therefore is *not* governed by the two-part test requiring "(1) that the state court's decision was 'contrary to' or 'an unreasonable application' of Supreme Court harmless error precedent; *and* (2) that the petitioner suffered prejudice under *Brecht* from constitutional error." *Merolillo v. Yates*, 663 F.3d 444, 454-55 (9th Cir. 2011) (emphasis in original) (quoting *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005)). "Habeas relief," we have held, "is warranted only if the error had a 'substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 454 (quoting *Brecht*, 507 U.S. at 637-38). We addressed our limited review under AEDPA in *Merolillo*:

> In *Fry v. Pliler*[4] . . . the Supreme Court squarely addressed the harmless error standard to be applied by a federal habeas corpus court and held that *Brecht* is the applicable test. In *Pulido v. Chrones*, we reaffirmed that under *Fry*, "we need to conduct an analysis under AEDPA of whether the state court's harmlessness determination on direct review . . . was contrary to or an unreasonable application of clearly established federal law," and held that "we apply the *Brecht* test without regard for the state court's harmlessness determination." 629 F.3d 1007, 1012 (9th Cir. 2010) (citing *Fry*, 551 U.S. at 119-22). In light of *Fry* and *Pliler*, we hold that the *Brecht* "substantial and injurious effect" standard governs our harmless error review . . . .

Id. at 455 (some alterations in original) (internal citations omitted) (granting habeas relief). Consequently, to determine whether Frost is entitled to habeas relief, our analysis is focused on whether the trial court's restriction on Frost's closing argument "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

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[4] In *Fry*, the Supreme Court stated:

> We hold that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht* . . whether or not the state appellate court recognized the error and reviewed it for harmless under the "harmless beyond a reasonable doubt" standard set forth in *Chapman*.

Fry, 551 U.S. at 121-22 (internal citations omitted).

[9] *Brecht* teaches that Frost is "not entitled to habeas relief based on trial error unless [he] can establish that it resulted in 'actual prejudice.' " *Id.* (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). We hold "[i]n light of the record as a whole" that the trial court's limitation on defense counsel's closing argument did not have a "substantial and injurious effect or influence in determining the jury's verdict" for several reasons. *Id.* at 638 (internal quotation marks omitted).

First, the evidence of Frost's guilt at trial was overwhelming. Frost gave three taped confessions, all of which were entered into evidence at trial. Further, although he testified that he was fearful of co-defendant Williams (a.k.a. "Fatal"), Frost also testified in detail to his involvement in the crimes for which he was charged as an accomplice: (1) he admitted that he drove Williams to the Gapp residence on the night of the robbery, that he entered the residence, and removed money and guns from Gapp's safe; (2) that he drove the co-defendants to the Taco Time restaurant, T and A video store, the 7/Eleven convenience store, and Ronnie's market on the night that each of the robberies took place; (3) that he was aware that Williams carried a bag containing such items as a ski mask and gloves that were routinely used to commit the crimes; and (4) he testified about his co-defendant's use of firearms. Finally, the testimony of Detective Broggi regarding the loaded guns, cash register, bank bags, safe, and ski masks that were found at Frost's home further corroborated Frost's role in the crimes.

Second, the state's burden of proof did not go uncontested because defense counsel was barred from contesting accomplice liability. As the district court

found in the face of powerful inculpatory evidence, Frost's counsel admitted during closing argument that although Frost was guilty of accomplice liability on certain counts, the state had failed to meet its burden of proof on others. Specifically, Frost's counsel argued:

> I think you can find Joshua Frost guilty of the Gapp robbery because that is just so overpowering, and he did go into the house. I think you can find Joshua Frost guilty of the T and A robbery not because he went in to do the robbery but because he actually entered the store. And the only reasons I think that you could find him guilty of that is that it is kind of just too much to ask for somebody who is willing to take the step to let him off.
>
> And I know that is what you are thinking, some of you. But as to the cases in which he didn't go in anywhere and was just told to stay put, we are asking you find him not guilty, and even if you find him guilty, he is not guilty of the guns. You can find him guilty of displaying the gun as an accomplice, I suppose, which is one of the things you have to find to make a robbery in the first degree. But that doesn't require you to find the special verdict firearm allegation in addition. You don't have to do that. And we hope you don't. And we think that the basis for not doing that is that the guns were out of his control.

Finally, the jury was fully informed of the state's burden to prove each element of the crime beyond a reasonable doubt, including accomplice liability. For example, the prosecutor in closing argument stated:

Now I have divided my closing argument into two different parts. The reason for that, ladies and gentlemen, is there really are two parts in some ways you look at this. The first part has to do with the charges and the evidence and has the state proven all the elements and all the crimes beyond a reasonable doubt. And then the second part has to do with the defense of duress, and this is important because the first part, again, the state has the burden. To get to duress, the first part, again, the state has the burden. To get duress you really have to find the state proves its case beyond a reasonable doubt . . . .

Let's start first with the charges. We went through these in the beginning and I want to quickly go through them, because there is a lot of them, there is a lot of different robberies and a lot of different assaults.

***

I will start off by talking about accomplice liability. The reason I will talk about that first is because that is really what this case is about in terms of the defendant's actions . . . a person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. The person is an accomplice in the commission of a crime if, with knowledge, that it will promote or facilitate the commission of a crime he . . . aids or agrees to aid another person in planning or committing a crime. And the word aid means all assistance whether by words, acts, or encouragement.

> Well the defendant has admitted that he knew what was going on. He knew that they were going to these stores, all of them, to commit a robbery. He knew they were armed and he knew that was the plan.

[10] Thus, in light of our review of the record, we hold that considering the evidence--Frost's three videotaped confessions, the incriminating evidence seized from his home, and the remaining trial testimony--and the focus during closing arguments both on Frost's duress defense by his attorney and on the State's burden of proof in general and as to accomplice liability in particular by the prosecutor, as well as the court's clear jury instructions regarding the State's burden of proof, the trial court's limitation on defense counsel's closing argument did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. There may be circumstances where a trial court's limitation on closing arguments may not survive the *Brecht* harmless error analysis. However, that is not the case here. Consequently, because Frost did not establish "actual prejudice," we hold that he is not entitled to habeas relief. *Id.*

IV

The Washington Supreme Court's decision that the trial court's restriction on closing argument did not constitute structural error was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. We need not consider whether the Washington Supreme Court erred in deciding that the trial court's restriction on Frost's closing argument violated his Sixth Amendment right to counsel and his Fourteenth Amendment due process rights because in

light of our review of the record as a whole, the trial court's restriction on Frost's closing argument did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. The record demonstrates that Frost was afforded the opportunity to present his defense—duress--and the State was not relieved of its burden of proof beyond a reasonable doubt. Federal habeas relief was properly denied.

AFFIRMED.

McKEOWN, Circuit Judge, Dissenting:

"Ladies and Gentlemen of the jury, there are two separate and distinct reasons why you should find my client not guilty. Unfortunately, I may explain only one of the reasons to you. (And a silent p.s.: I wish I could argue reasonable doubt to you, but I can't!)." This hypothetical summation mimics the extraordinary circumstances of Frost's closing argument, the legal equivalent of counsel having one hand tied behind his back. Due to a misunderstanding of state law, the trial judge forced Frost to "opt for one or the other" legitimate defense--arguing duress or putting the government to its burden of proof. This undisputed denial of the constitutional right to present proper argument on alternative defense theories created a Hobson's choice that violated Frost's Sixth Amendment Right to Counsel and his Fourteenth Amendment Due Process Rights.

In *Herring v. New York*, the Supreme Court explained the critical importance of closing argument: "The Constitutional right of a defendant to be heard through counsel *necessarily* includes his right to have his counsel make a proper argument on the evidence

and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem." 422 U.S. 853, 860 (1975) (quotation marks omitted) (emphasis added). Not only that, "the trial court has *no discretion* to deny the accused such right." *Id.* (emphasis added). It is no surprise that legal lore focuses on the centrality of closing argument--from Clarence Darrow to F. Lee Bailey, and even the television lawyer Perry Mason. Forcing Frost's counsel to roll the dice by choosing to defend on one theory or the other set up a structural deficiency that tainted the framework of Frost's trial. Because closing argument plays a critical role in the adversarial process, improperly restricting counsel to a solitary defense theory is both a violation of the accused's constitutional rights and a structural error mandating a new trial. I respectfully dissent from the majority's holding that such a denial is not structural error.

The Washington Supreme Court unanimously held that the trial court's erroneous interpretation of defenses available under Washington law violated Frost's constitutional rights. *State v. Frost*, 161 P.3d 361, 368-69 (Wash. 2007). The court first noted that "it is generally permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence," *id.* at 365, and that the trial court here erred in precluding alternative defenses. Although "a defendant may be required to admit that he committed acts constituting a crime in order to claim duress, he or she is not required to concede criminal liability." *Id.* at 368. Because Frost opted to argue a duress defense, the trial court forced him to do exactly what is prohibited--concede criminal liability on the robberies and let the government off the hook on the "beyond a reasonable doubt" standard.

The state high court recognized that "[b]y preventing counsel from arguing this point in closing, the trial court lessened the State's burden to some degree." *Id.* at 368. Significantly, the court held that there "remained an evidentiary basis, however slim, for counsel to argue that the State failed to prove Frost participated in each of his accomplices' criminal acts with adequate knowledge of promotion or facilitation." *Id.* Frost's claim that the prosecution had not met its burden regarding accomplice liability was "best illustrated by the robberies in which Frost was only a driver and remained in the car." *Id.* at 368-69. The court concluded that the trial court's error "resulted in the imposition of an undue limitation on the scope of defense counsel's closing argument. This limitation infringed upon Frost's due process and Sixth Amendment rights." *Id.* at 369. The Washington Supreme Court was unanimous on this point. Nonetheless, the five-justice majority treated the error as harmless rather than structural. *Id.* at 369-70.

According to the four dissenting justices, "[t]he entire framework of Frost's trial was tainted because the jury was not privy to his full defense." *Id.* at 371 (Sanders, J., dissenting). Once the prosecution finished arguing that it had met its burden, Frost's counsel's silence on the reasonable doubt issue infected the entire trial process. *Id.* at 372 (the trial court's "error vitiates the jury's finding because we cannot know the jury would have decided but for defense counsel's final arguments."). The challenge to the state court's majority opinion, declining to find structural error by a 5-4 margin, meets the difficult standard for habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2254(d)(1).

Unable to circumvent the legal principle announced in *Herring*, the majority improperly imposes a super-AEDPA requirement that the Supreme Court have "addressed in a holding" the "restriction on the scope of closing argument." Op. at 9571. *But see Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) ("Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a *governing legal principle* to a set of facts different from those of the case in which the principle was announced." (emphasis added)). The majority then goes astray in concluding that the state court's holding as to structural error is neither contrary to nor an unreasonable application of Supreme Court law as set forth in *Herring*.

I. Declining To Find Structural Error Is Contrary To Supreme Court Law

The Supreme Court has not equivocated: "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial." *Herring*, 422 U.S. at 858. The Court in *Herring* did not grant the accused partial satisfaction by limiting the constitutional right to one particular defense theory; instead, as though anticipating the situation here, the Court used as an example the inalienable right of the defense to argue that the prosecution had not met its burden. *Id.* at 862 ("for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt to the defendant's guilt."). Interpreting *Herring* as limited to absolute preclusion of final argument misreads the case. Total preemption of half the legitimate defenses is tantamount to absolute preclusion of argument on half the case.

Here, as in *Herring*, that preclusion resulted in a structural error.

A state court decision is contrary to clearly established law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Although structural errors that command automatic reversal are rare, this is such a case. The Supreme Court has repeatedly stated, including in the landmark *Fulminante* case, that harmless error analysis is not appropriate in cases that "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). According to the Court, nothing "could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Herring*, 422 U.S. at 862; *see also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) (recognizing structural error where "counsel was . . . prevented from assisting the accused during a critical stage of the proceeding.").

The majority upholds harmless error review by incorrectly claiming that the trial court was simply exercising its discretion in denying argument on what it considered to be mutually exclusive defenses. To the contrary, the Washington Supreme Court unanimously held that "the trial court erroneously interpreted our decision in *Riker* and, based on that erroneous interpretation, unduly limited the scope of Frost's counsel's closing argument, thus abusing its discretion." *Frost*, 161 P.3d at 365. The court's reference to abuse of discretion was legal speak for the fact that the trial court was flat wrong as a matter of

law. The trial court's restriction was not an exercise of its "great latitude in controlling the duration and limiting the scope of closing summations." *Herring*, 422 U.S. at 862. Legitimate leeway to control the scope of closing argument cannot be equated with the absolute and erroneous denial of argument on a factually supported, legally available defense. When *Herring* is applied to the facts of this case--where the trial court did not exercise its discretion--it is clear that, with respect to the burden of proof defense, the difference "between total denial of final argument and a concise but persuasive summation, could spell the difference, for the defendant, between liberty and unjust imprisonment." *Id.* at 863.

The imposition of a total gag order on Frost's constitutional right to argue that the prosecution had not met its burden of proof struck at the heart of the trial framework. In fact, the compounding error here--requiring concession of guilt--was far worse than the error in *Herring*, where counsel's forced silence did not amount to a concession of guilt. The error at Frost's trial was not simply "an error in the trial process itself," but compromised counsel during a critical stage of the proceeding.

The dilemma for Frost's counsel could not have been starker when he had to give up argument on the reasonable doubt standard--a constitutional mainstay of defense closing arguments--in exchange for a duress instruction. Because the trial court threatened to take the duress instruction "out of the case" if Frost discussed the government's failure to meet its burden, the jury could not hear the magic words "beyond a reasonable doubt" from the mouth of the defense counsel.

The prosecutor's parroting of the reasonable doubt standard, one he claimed to have surmounted, can hardly be considered equivalent to argument from Frost's perspective. Under the Sixth Amendment, no aspect of an attorney's advocacy is more important than marshaling the evidence for his own side in closing. *Herring*, 422 U.S. at 862. The majority fails to explain how the *prosecutor's* unrestricted argument countenances deprivation of Frost's constitutional "right to be heard in summation of the evidence from the point of view most favorable to him." *Id.* at 864. From a practical standpoint, where the right is infringed so as to excise a key defense, "[t]here is no way to know whether [the unmade arguments] in summation might have affected the ultimate judgment . . . ." *Id.* As the legal maxim recognizes, defense argument here would have brought things hidden and obscure to the light of reason. Nonetheless, the majority conjectures that the jury simply "did not buy" Frost's defense even though the defense "wisely conceded" Frost's participation in the crime to "maintain credibility." Op. at 9573. The majority glosses over the fact that Frost's counsel was forced by the trial court to make this so-called concession, and that the right to closing argument exists "however simple, clear, unimpeached, and conclusive the evidence may seem." *Herring*, 422 U.S. at 860.

Contrary to the governing legal principle announced in *Herring*, the majority holds that no structural error occurs so long as an accused is allowed to argue *any* of his defense theories. Op. at 9573 ("Frost was not denied the opportunity to make a closing argument--nonetheless he was afforded the opportunity to argue his defense of duress."). Nothing in *Herring* supports the majority's half a loaf limitation. The state court's holding that no structural

error occurred was directly contrary to Supreme Court law as set out in *Herring*.

II. DECLINING TO FIND STRUCTURAL ERROR IS AN UNREASONABLE APPLICATION OF SUPREME COURT LAW

Not only is the state court's holding contrary to *Herring*, the holding also unreasonably applies *Herring* to the particular facts of Frost's case. We know from *Williams* that "[a] state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case ,. . . [is] 'an unreasonable application of . . . clearly established Federal law.'" 529 U.S. at 407-08 (quoting 28 U.S.C. § 2254(d)(1)). The Washington Supreme Court correctly identified the rule in *Herring*, but then failed to reasonably apply it to a new set of facts. The majority compounds this error by creating a new requirement for AEDPA relief--factual identity with Supreme Court precedent--which is not the law. The Supreme Court emphasized this point in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), where it reversed an Eleventh Circuit decision applying an improperly restrictive test under the AEDPA: "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" (citations omitted)

The unreasonableness of the state court's application of *Herring* is underscored by our decision in *United States v. Miguel*, which mirrors this case. 338 F.3d 995 (9th Cir. 2003). The majority brushes *Miguel* aside, stating that it is, by itself, insufficient to

establish federal law. Op. at 9575. I have no quarrel with that point, but *Miguel* does not exist in a vacuum; instead, it illustrates the application of the legal principle from the Supreme Court's decision in *Herring* to a new set of facts. Although Ninth Circuit law alone is undisputedly not "clearly established federal law," when such law explains clearly established Supreme Court law, it is persuasive authority that helps determine whether the state court unreasonably applied Supreme Court law. *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000).

In *Miguel*, we found structural error where the district court precluded defendant's counsel from arguing a defense theory. 338 F.3d at 1003. Because the district court erroneously believed that there was no evidence that anyone other than defendant had fired the gun, it foreclosed this line of argument. *Id.* at 999. Relying on *Herring*, we stated: "Because reasonable inferences from the evidence supported the defense theory, the court erred in precluding counsel from arguing his theory and in instructing the jury that no evidence supported it. Such an error is structural and requires reversal under our precedent." *Id.* at 1001; *see also Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (granting pre-AEDPA habeas relief because of both structural error and a violation of the right to counsel when the state court precluded counsel "from arguing his theory of the defense in closing arguments.").

In Frost's case, the trial court declined to allow alternative defense arguments based on an erroneous understanding of state law and on its misapprehension of the factual predicate for a duress defense. *Miguel*, which raises an identical theory

preclusion issue, delineates the metes and bounds of the structural error principle set forth in *Herring*: absolute preclusion of closing argument on a legitimate defense theory is a constitutional error that undermines the structure of the trial process. The majority sidesteps this reality by inappropriately invoking its newly-created "identical facts" requirement and offering up the rationale that *Miguel's* reading is not "the *only* reasonable reading of *Herring*." Op. at 9577. On the facts here, the majority's reading is unreasonable under AEDPA. The majority also mischaracterizes this argument as one where "[t]he logical extension of the dissent's rule would be to declare structural error and automatic reversal any time a trial judge placed limits on closing arguments." Op. at 9576. Not so. The rule at issue relates to the *total* denial of closing argument on a legitimate theory, not to discretionary limits on the argument.

To make matters worse, the paramount nature of the defense argument that was foreclosed--the government's burden of proof--strikes at the heart of the right to counsel. The Supreme Court has repeatedly stated that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic*, 466 U.S. at 656 n.19. Indeed, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment

rights that makes the adversary process itself presumptively unreliable." *Id.* at 659.

Our decision in *United States v. Swanson*, based on principles derived from the above Supreme Court cases, further demonstrates the unreasonable application of *Herring* to the facts here. 943 F.2d 1070 (9th Cir. 1991). In *Swanson*, we reversed a conviction because defense counsel conceded that the government had met its burden of proof. We wrote that the concession "lessened the Government's burden of persuading the jury" and caused a "breakdown in our adversarial system." *Id.* at 1074. A new trial was required because counsel's "conduct tainted the integrity of the trial." *Id.* Prejudice was presumed because the concession that the prosecution had met its burden "was an abandonment of the defense of his client at a critical stage of the criminal proceedings." *Id.*

Frost's concession of guilt here is no different than the ineffective counsel in *Swanson* who voluntarily conceded guilt. In truth, being forced to concede guilt by the court is a far greater error with the same end result: unconstitutional lessening of the government's burden. Such lessening of the government's burden is structural error requiring reversal. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (erroneous definition of "reasonable doubt" vitiated all of the jury's findings because one could only speculate what a properly charged jury might have done). In denying relief, the majority conflates the improper lessening of the government's burden of proof with Frost's factual inability to deny that he "participated in the crime spree." Op. at 9573.

The Hobson's choice forced upon Frost pitted one constitutional right against another--his right to

put the government to its burden and his right to full and complete closing argument--thus hobbling his rights to effective counsel and due process. The trial court's error tainted the framework of the trial by rendering Frost's conviction speculative. Because the state court's decision is both contrary to and an unreasonable application of Supreme Court law as set forth in *Herring*, I respectfully dissent.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

JOSHUA JAMES FROST, Petitioner, v. RON VAN BOENING, Respondent.	JUDGMENT IN A CIVIL CASE Case No. C09-725-TSZ

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is adopted and approved. Petitioner's federal habeas petition and this action are **DISMISSED** with prejudice. Petitioner's motion for discovery is **DENIED**. A certificate of appealability is granted for claim 3 under 28 U.S.C. § 2253. A certificate of appealability is **DENIED** for claims 1, 2 and 4.

Dated this 7th day of February, 2011.

WILLIAM M. MCCOOL
Clerk

s/ Claudia Hawney
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSHUA JAMES FROST, Petitioner, v. RON VAN BOENING, Respondent.	No. C09-725Z ORDER

THIS MATTER comes before the Court on the Report and Recommendation ("R&R") of Brian A. Tsuchida, United States Magistrate Judge, docket no. 30. Having reviewed petitioner's objections to the R&R and supporting materials, docket nos. 35 and 36, the response thereto, docket no. 37, and petitioner's reply and additional exhibits, docket no. 38, the Court hereby ORDERS:

(1) The R&R, docket no. 30, is ADOPTED;

(2) The amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, docket no. 14, is DISMISSED with prejudice;

(3) Petitioner's motion for discovery, docket no. 25, is DENIED;

(4) A certificate of appealability is GRANTED pursuant to 28 U.S.C. § 2253 as to claim 3 of the amended petition; and

(5) A certificate of appealability is DENIED as to claims 1, 2, and 4 of the amended petition.

In his objections to the R&R, petitioner accuses the King County Prosecutor's Office of engaging in "persistent efforts to suppress" the impeachment evidence relating to trial witness Eddie Shaw. The documents petitioner has submitted contradict his allegation. *See* Letters dated April 1, 2008, and May 8, 2008 (docket no. 38-1 at 3 & 8). Moreover, petitioner fails to make any showing that Shaw's testimony was in some way pivotal to the prosecution's case against him. According to the recitation of facts on direct review of petitioner's conviction, Shaw had been staying at petitioner's house and saw petitioner and others trying to open a safe. *State v. Frost*, 2005 WL 1579705 at *2 (Wash. Ct. App.), *aff'd*, 160 Wash.2d 765, 161 P.3d 361 (2007). Shaw inquired of petitioner whether these men were responsible for recent robberies and petitioner replied "he has to do what he has to do." *Id*. Shaw then went to police and tried to exchange information for more lenient treatment on pending charges, but the detective with whom he spoke refused to agree to any deal.

Shaw nevertheless told the detective what he had observed. Based on this information, the detective advised patrol officers to arrest anyone leaving petitioner's house. Upon arrest, co-participant Matthew Williams admitted that he had committed a robbery at a small grocery store and shot the clerk. The detective then obtained a search warrant for petitioner's house, pursuant to which police found two handguns, a cash register, bank bags, three safes, and ski masks linking petitioner to the offenses at issue. *Id*. Petitioner gave three taped statements to police about his involvement in the various robberies, and his defense at trial was that he had participated in the crimes under duress and

in fear of harm from Williams. *Id.* at *3. Shaw subsequently negotiated a plea agreement with the King County Prosecutor's Office, receiving a lesser sentence in exchange for his trial testimony. *Id.* at *2.

To the extent that Shaw played a key role in petitioner's convictions, it was not at trial, but rather at the time he identified petitioner to police as a suspect, long before he had made any deal concerning his testimony. Although Shaw set in motion the events leading to petitioner's arrest, his testimony at trial was only a minor piece of the evidence supporting petitioner's conviction. Thus, in addition to the reasons articulated in the R&R for dismissing claims 1 and 2 of the amended habeas petition, and for denying an evidentiary hearing and petitioner's motion for discovery, the Court concludes that any lack of completeness in the prosecution's disclosures, or in the trial testimony, concerning Shaw's plea deal is harmless.

Petitioner's other objections to the R&R are without merit and are fully addressed in the R&R. The Court adopts the R&R's analysis of those issues. The Court agrees with the R&R that a certificate of appealability is warranted only with regard to claim 3 of the amended habeas petition.

The Clerk is directed to send a copy of this Order to all counsel of record, to petitioner, and to Magistrate Judge Tsuchida.

IT IS SO ORDERED.

Filed and entered this 4th day of February, 2011.

s/ Thomas S. Zilly
Thomas S. Zilly
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSHUA JAMES FROST, Petitioner, V. RON VAN BOENING, Respondent.	No. C09-725-TSZ-BAT REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Joshua J. Frost has filed a writ of habeas corpus under 28 U.S.C. § 2254 challenging his 2003 King County convictions and 55 year prison sentence. Dkt. 14.

By counsel, Frost raises four grounds for relief: (1) the prosecutor knowingly withheld material exculpatory evidence regarding trial witness Edward Shaw in violation of the Fourteenth Amendment; (2) the prosecutor knowingly elicited false trial testimony from Edward Shaw, in violation of the Sixth and Fourteenth Amendments; (3) the trial court violated Frost's Fourteenth Amendment due process rights and Sixth Amendment right to counsel by prohibiting trial counsel from making closing arguments that the state failed to prove Frost was an accomplice; and (4) by adding charges after Frost declined to accept a plea bargain, the prosecuting attorney acted vindictively in violation of the Fourteenth Amendment. Dkt. 14 at 9–14.

In his Answer, respondent contends claims 1 and 2 are procedurally defaulted and not properly before the Court and that claims 3 and 4 lack merit and should be dismissed. Dkt. 15 at 10–32. Frost filed a Response (Dkt. 21) and a motion for discovery seeking leave to obtain records regarding himself and trial witness Edward Shaw from the King County Prosecuting Attorney and Sheriff, Federal Way Police Department, Washington State Department of Corrections, Valley Narcotics Enforcement Team and the Washington State Department of Social and Health Services. Dkt. 25. Respondent filed a Reply to the Frost's Response to Respondent's Answer and opposes the discovery request. Dkts. 22, 28.

The Court, having reviewed the pleadings and the record, recommends Frost's habeas petition be **DENIED** and the action **DISMISSED**. Additionally, because Frost has not shown good cause to conduct discovery and claims 1 and 2 are procedurally defaulted, the Court recommends Frost's motion for discovery be **DENIED**.

BACKGROUND

A. Facts Surrounding Conviction

The Washington Supreme Court summarized the facts surrounding Frost's convictions as follows:

> Frost's criminal conduct involved five discrete incidents over 11 days. First, on April 8, 2003, Frost, together with accomplices Matthew Williams and Alexander Shelton, robbed and burglarized the home of Lloyd and Verna Gapp. Frost acted as the driver and also entered the home with Williams and Shelton. Firearms were used.

On April 12, 2003, Frost acted as the driver for Shelton and Williams, who robbed a Taco Time restaurant while armed with firearms. Then on April 15, 2003, Frost, Williams, Shelton, and another man participated in the robbery of T and A Video. Frost again acted as the driver and also performed surveillance of the video store prior to the robbery. On April 17, 2003, Frost acted as the driver for Williams and Shelton, who robbed a 7/Eleven store at gunpoint. During this robbery, one accomplice threatened two customers in the store's parking lot with a gun. Immediately following this robbery, Frost drove Williams and Shelton to Ronnie's Market, which they also robbed using firearms. During the course of this robbery, employee Heng Chen was shot in the hand.

Frost, Williams, and Shelton were arrested on April 20, 2003. Several firearms, a cash register, safes, bank bags, and ski masks associated with the above offenses were found inside Frost's home. Frost made multiple confessions to the police regarding the above offenses, recordings of which were introduced at trial. Ultimately, Frost was charged with six counts of robbery, one count of burglary, one count of attempted robbery, and three counts of assault; most charges included firearms enhancements.

Prior to trial, Frost moved to suppress his statements to the police; the court denied his motion and admitted the confessions. Frost testified at trial. He generally admitted

participating in the robberies but claimed he acted under duress.

During a discussion of the proposed jury instructions, Frost's counsel indicated he intended to argue both that the State failed to meet its burden as to accomplice liability and that Frost acted under duress in committing the charged robbery offenses. The State objected to this form of argument. The trial court ruled that defense counsel could not argue both theories in closing, citing *State v. Riker*, 123 Wash.2d 351, 869 P.2d 43 (1994). Verbatim Report of Proceedings (VRP) (Dec. 11, 2003) at 126–28. The court informed defense counsel that if he attempted to argue that the State had failed to meet its burden of proof as to any of the robbery offenses, then the court would not instruct the jury on duress as to those offenses. *Id.* at 126. Defense counsel objected to the court's ruling. In closing, defense counsel did not argue that the State had failed to meet its burden of proof as to Frost's robbery offenses. Instead, defense counsel limited his argument to the affirmative defense of duress.

In closing, the prosecutor repeatedly mentioned the State's burden of proof as to Frost's robbery offenses. *Id.* at 148–49, 152, 160. Likewise, the jury was properly instructed on the State's burden of proof in general, as well as the requirements to prove accomplice liability in particular. *See* Clerk's Papers (CP) at 178, 180. A jury found Frost guilty of all of the charged offenses except one assault. Frost was sentenced to more than 50

years imprisonment, including the consecutive firearms enhancements.

State v. Frost, 160 Wash.2d 765, 769–70 (2007) (en banc).

B. Procedural History

Frost raised several claims in his direct appeal, filed on July 5, 2005. Dkt. 17, ex. 2. Frost argued the trial court violated his rights to due process and counsel by prohibiting trial counsel from making closing arguments that the prosecution failed to prove Frost was an accomplice. Frost also argued the prosecutor's decision to add charges when Frost declined to accept a plea bargain created a realistic likelihood of prosecutorial vindictiveness. *Id.* at ex. 2. The Washington Court of Appeals, Division I affirmed Frost's conviction. *Id.* at ex. 5. The Washington Supreme Court accepted review limited to the claim that the trial court erred in limiting defense counsel's closing argument at trial. *Id.* at ex. 8. The Washington Supreme Court held the trial court abused its discretion by limiting the scope of counsel's closing argument and infringed upon Frost's due process and Sixth Amendment rights, but affirmed Frost's conviction, finding the error was harmless. *Frost*, 160 Wash.2d at 782–83. The United States Supreme Court denied certiorari on January 14, 2008. *Frost v. Washington*, 552 U.S. 1145 (2008).

Frost then filed a Personal Restraint Petition (PRP) with the Washington Court of Appeals, Division I on November 27, 2007 raising grounds for relief unrelated to the instant petition. Dkt. 17, ex. 12. The PRP was denied and the Washington Supreme Court denied review. *Id.* at ex. 13 and 15. Frost's subsequent Motion to Modify Commissioner's

Ruling was denied. *Id.* at ex. 17. On May 28, 2008, Frost filed a second PRP with the Washington Supreme Court raising claims unrelated to the instant petition. *Id.* at ex. 19. The second PRP was dismissed. *Id.* at ex. 22. Frost's subsequent Motion to Modify Commissioner's Ruling was also denied. *Id.* at ex. 24.

Frost filed the instant Habeas Corpus Petition on May 22, 2009, (Dkt. 4) and moved to stay the proceedings pending the outcome of a third PRP he filed with the Washington Supreme Court on May 26, 2009. Dkt. 17, ex. 26. In the third PRP, Frost raised, for the first time, grounds one and two of the instant petition, arguing that his due process rights were violated because the prosecuting attorney withheld exculpatory evidence and elicited false testimony from trial witness Edward Shaw. *Id.* at 4–15. The Washington Supreme Court denied the PRP as time barred on November 10, 2009. Dkt. 17, ex. 32.

On February 18, 2010, the Court lifted the stay on Frost's Habeas Corpus Petition. Dkt. 13. Frost filed the instant amended petition on February 26, 2010. Dkt. 14. Frost filed several supplemental submissions of relevant state court documents. Dkts. 20, 23, 24, 27. Frost also filed a Motion for Discovery seeking further discovery on the State's plea bargain with trial witness Edward Shaw. Dkt. 25.

DISCUSSION

A. Claims 1 and 2 are Procedurally Defaulted

The procedural default rule bars consideration of a federal claim when a state court has been

presented with the federal claim, but declined to reach the issue for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230–31 (9th Cir. 2002). The Court may "not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A habeas petitioner who fails to follow the state's procedural requirements for presenting his federal claims effectively deprives the state of an opportunity to address the petitioner's claims of constitutional error in the first instance. *Id.* at 732. Where a habeas petitioner has defaulted his federal claims in state court under an independent and adequate state procedural rule, federal habeas review of the claims is barred unless a petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."[1] *Id.* at 750.

1. Independent and Adequate State Grounds

Respondent argues Frost procedurally defaulted claims 1 and 2 because he raised them in an untimely manner, and the Washington Supreme Court dismissed the claims as time barred under

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[1] Under exceptional circumstances, a writ of habeas corpus may be granted on a defaulted claim without a showing of cause and prejudice to correct a "fundamental miscarriage of justice" where a constitutional violation has resulted in the conviction of a defendant who is actually innocent. *Murray v. Carrier*, 477 U.S. 478, 495–96 (1986). Frost however does not contend he is actually innocent and thus this alternate basis for adjudicating defaulted claims need not be addressed.

RCW 10.73.090.[2] Dkt. 15 at 11–13. Although Frost agrees the state court dismissed these claims on this procedural ground, he contends the claims are not defaulted.

Frost first argues Washington's time bar is not an adequate and independent rule that procedurally bars review of the claims by the Court because the rule is subject to equitable tolling in the state courts. Dkt. 21 at 27–28. This argument has no merit. Whether a state procedural rule is adequate to bar federal habeas review is a question of federal law. *Lee v. Kemna*, 534 U.S. 362, 375 (2002). A state rule is adequate if it is "firmly established and regularly followed" by the state court at the time of the petitioner's procedural default. *Id.* at 389. The ultimate burden of proving adequacy is on the state. *Bennett v. Mueller*, 322 F.3d 573, 585–86 (9th Cir. 2003), *cert. denied*, 540 U.S. 938 (2003). However, if the state adequately pleads an independent and adequate state procedural ground, the burden shifts to the petitioner to come forward with "specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* at 586.

Respondent contends the Washington Supreme Court relied upon RCW 10.73.090, an independent and adequate state procedural ground, to dismiss claims 1 and 2 as untimely. Frost thus has the burden to establish the rule is inadequate.

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[2] RCW 10.73.090(1) provides "No petition or motion for collateral attack on a judgment and sentence may be filed more than one year after the judgment becomes final if the judgment is valid on its face and was rendered by a court of competent jurisdiction."

Frost, however, presents no facts showing that the rule is inadequate and no federal authority supporting his contention that because the Washington Supreme Court has the discretion to equitably toll RCW 10.73.090 the rule is inadequate. That he has failed to do so is not surprising for two reasons. First, the Ninth Circuit has previously determined that RCW 10.73.090 is an independent and adequate state ground to bar habeas review, and Frost presents nothing here that would lead to a contrary conclusion. *See Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000); *Casey v. Moore*, 386 F.3d 896, 920 (9th Cir. 2004).

Second, while Frost argues that discretionary application of a rule renders the rule inadequate to bar federal habeas review, the Supreme Court recently reached the opposite conclusion. The Supreme Court held that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine." *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009).

2. Cause and Prejudice

Frost next argues that if even the claims are defaulted, he has shown cause to excuse the default and that the violations alleged in claims 1 and 2 have prejudiced him. Dkt. 21 at 26–27. The Court disagrees. To establish "cause" Frost must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Here, Frost argues the prosecutor at trial "knowingly elicited false testimony and suppressed impeachment evidence"

(Dkt. 21 at 29) and that Frost's trial counsel could not have discovered this until after Frost's trial was over. *Id.* at 30–31. This argument might establish cause for Frost's trial counsel's failure to discover the impeachment evidence prior to conviction. However, this argument fails to explain why Frost did not thereafter timely present claims 1 and 2 to the state court when the evidence upon which these claims are based was in the public record two days after Frost's conviction.

Frost provides no explanation why he failed to present the claims in his first or second PRP when the evidence supporting the claims was available to him. Instead, the record shows Frost waited until 2009 to raise the claims in a third PRP filed with the Washington Supreme Court. The Washington Supreme Court dismissed the PRP as untimely, a fact that is not in dispute. The Washington Supreme Court found Frost had failed to demonstrate he acted with diligence in discovering the impeachment evidence regarding trial witness Edward Shaw when that evidence was in the public record and available to Frost days after his conviction. Dkt. 17, ex. 32 at 2–3.

The Court therefore concludes Frost has failed to demonstrate cause to excuse the dismissal of his claims as untimely by the Washington Supreme Court. Two days after his conviction, the impeachment evidence underlying claims 1 and 2 were part of the public record and available to Frost. *See* Dkt. 14, Love Dec. at 3–4. Even if Frost could not have discovered this evidence and raised his *Brady* and *Napue* claims before his conviction, he had another opportunity to timely assert the claims in state proceedings but failed to do so. Hence, there

is no causal link between the impediments Frost faced in raising the claims at trial, and the failure to raise them during state post-conviction proceedings, and their ultimate default.

Because Frost has not shown cause to excuse his failure to timely present claims 1 and 2 in state proceedings, the Court need not reach the matter of prejudice. *See Cook v. Schriro*, 538 F.3d 1000, 1028 n. 13 (9th Cir. 2008) ("Because Cook cannot show cause, we need not consider whether he suffered actual prejudice."); *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982) ("Since we conclude that these respondents lacked cause for their default, we do not consider whether they also suffered actual prejudice."). Accordingly, the Court concludes claims 1 and 2 are procedurally defaulted and should be dismissed.

B. Claim 3: Trial Court's Limitations on Defense's Closing Argument

Reviewing the claim on direct appeal, the Washington Supreme Court held the trial court abused its discretion by limiting the scope of the defense's closing argument, but affirmed Frost's conviction finding the error was harmless and not structural in nature. *Frost*, 160 Wash.2d at 782–83.[3] Frost contends (1) the trial court's limitation is structural error and (2) the Washington Supreme Court's conclusion that the error is harmless is an objectively unreasonable application of federal law under *Rose v. Clark*, 478 U.S. 570 (1980) and *Neder v. United States*, 527 U.S. 1 (1999). Dkt. 21 at 21.

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[3] As the State has not challenged the Washington Supreme Court's determination that the trial court erred, the Court will assume without deciding that this determination is correct.

1. Structural Error

Frost argues the Washington Supreme Court erred in failing to find the restriction on closing argument is structural error. *Id.* at 18. Before discussing this argument, we address the Court's limits in reviewing federal habeas petitions. In federal habeas proceedings, the Court must uphold the state court's decision unless it is "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court," or was "based on an unreasonable determination of the facts in light of the evidence presented in a State Court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

"Contrary to" means the state court's conclusion is opposite to that reached by the Supreme Court on a question of law, or that the state court's decision is different than a decision of the Supreme Court on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). "Unreasonable application" means the state court has correctly identified the law as established by the Supreme Court, but has unreasonably applied or extended it to the facts of the prisoner's case. *Id.* at 407. "[A]n unreasonable application of federal law is different from an incorrect application. *Id.* at 410. A federal court cannot grant habeas relief because it concludes in its independent judgment that the state court applied federal law incorrectly or erroneously. *Id.* at 411. Rather a federal court may overturn a state court's decision only if the state court's application of federal law is "objectively unreasonable." *Id.* at 409; *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

"Clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Id.* at 71–72. A legal principle is "clearly established under § 2254(d)(1) only when it is set forth in the holding of a Supreme Court decision." *Williams*, 362 U.S. at 412. Applying these principles, the Court concludes the Washington Supreme Court's determination that the trial court's limitation on Frost's closing argument is not structural error is neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court.

Frost's structural error argument relies on *Herring v. New York*, 422 U.S. 853 (1975). Dkt. 21 at 14. Specifically, Frost argues the Supreme Court in *Herring* "recognized that undue restrictions on closing argument implicate the Sixth Amendment right to counsel" and that "where a court prevents the accused from arguing a valid theory of the case in closing argument, such error is structural and not subject to harmless error review. *See, e.g., Herring*, 422 U.S. at 865." *Id.* at 16.

Herring involved a non-jury criminal case in which the trial judge denied counsel the right to make a closing argument stating "I choose not to hear summations." *Herring*, 422 U.S. at 856. The Supreme Court identified closing argument as "a basic element of the adversary fact finding process in a criminal trial" and held the total denial of the opportunity to make closing argument in a state criminal trial violates the Sixth Amendment. *Id.* at 858, 865. It is thus immediately apparent the Washington Supreme Court's decision is not "contrary to" *Herring*. Unlike *Herring*, the trial

judge in Frost's case did not deny Frost the opportunity to make closing argument. *Herring* held the Sixth Amendment is violated where there is a total denial of the opportunity to make closing argument. *Id.* at 865. But, *Herring* did not hold that placing a limit on closing arguments, such as the one placed on Frost, is a structural error that violates the Sixth Amendment.

Because of the differences between *Herring* and his case, Frost attempts to argue, by analogy, that the limitation placed upon his defense attorney's closing argument should be considered the equivalent of the total denial of closing argument that occurred in *Herring*. Dkt. 21 at 16–20. This argument is not persuasive on habeas review because *Herring* said nothing about whether certain limitations on closing argument were the equivalent of the total denial of closing argument. *See, e.g., Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (rejecting the extension or analogy of a legal rule from one case to a different case as a basis for habeas relief. Specifically, the Supreme Court rejected the conclusion that *Faretta*, implies a right of the *pro se* defendant to have access to a law library as a basis for federal habeas relief because "*Faretta* says nothing about any specific legal aid the State owes a *pro se* criminal defendant.").

Frost's argument by analogy also misses the mark on the Supreme Court's harmless error jurisprudence. The Washington Supreme Court found the trial court committed error of constitutional magnitude. But the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. *Washington v. Recuenco*, 548 U.S. 212, 219 (2006). In fact, "[m]ost

constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). The Supreme Court has identified a very limited number of errors that are structural and has further provided that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *See, e.g., Rose*, 478 U.S. at 578–79. The only errors which the Supreme Court has explicitly identified as structural are: the complete denial of counsel; biased trial judge; racial discrimination in selection of grand jury; improper denial of self-representation at trial; denial of public trial; defective reasonable-doubt instruction. *See Recuenco*, 548 U.S. at 219 n. 2 (internal citations omitted).

Thus, structural error is "the exception and not the rule."[4] The Washington Supreme Court's determination that the trial court's error was not structural is not contrary to the Supreme Court's holding in *Herring* or its other structural error jurisprudence.

Frost also invites the Court to find structural error under circuit law citing to *Conde v. Henry*, 198 F.3d 734 (9th Cir. 1999), a case Frost contends present "facts indistinguishable from those here." Dkt. 21 at 17. The Court declines the invitation. First, circuit case law is not clearly established federal law as determined by the Supreme Court and is not, alone, a basis for the Court to grant habeas relief. *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010) (Court of Appeals decision "does not constitute "clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), so any failure to

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[4] *United States v. Hasting*, 461 U.S. 499, 509 (1983).

apply that decision cannot independently authorize habeas relief under AEDPA.").

Second, even if the Court could look to *Conde* for guidance as to Federal law as determined by the Supreme Court, the Court finds *Conde* to be of no help to Frost. *Conde* involved circumstances quite different to those in Frost's case. In *Conde*:

> [T]he trial court improperly precluded Conde's attorney from making closing argument explaining the defendant's theory of the case, it refused to instruct the jury on the defendant's theory, and, over the defendant's objection, it gave jury instructions that did not require the jury find every element of the offense. Together, these errors deprived petitioner of effective assistance of counsel, due process and trial by jury on every element of the charged crime.

Conde, 198 F.3d at 741. It was under these circumstances that the Ninth Circuit concluded structural error had occurred. *Id.*

In contrast, Frost presented and was allowed to argue what was clearly his central defense theory—that he acted under duress. Dkt. 20, ex. 13 at 171–89 (defense attorney's closing argument, raising defense of duress, especially when Frost only acted as the driver and contesting State's proposed firearm enhancements). The limits placed on Frost did not relieve the prosecution of its burden to prove each element of the crimes charged including whether Frost was an accomplice and the trial court properly instructed the jury of the burdens of proof and the elements of the offenses. Dkt. 17, ex. 20, app. D (jury instructions). The record clearly shows the prosecutor argued it was the state's burden to

prove that Frost was an accomplice and to prove beyond a reasonable doubt each and every element of the charged offenses. Dkt. 20, ex. 13 at 147–71 (prosecutor's closing argument). The Washington Supreme Court noted this stating, "In closing, the prosecutor repeatedly mentioned the State's burden of proof as to Frost's robbery offenses. Likewise, the jury was properly instructed on the State's burden of proof in general, as well as the requirements to prove accomplice liability in particular." *Frost*, 160 Wash.2d at 770. Thus, given the clear differences between the circumstances in *Conde* and Frost's case, the Court concludes that *Conde* does not support Frost's contention that the Washington Supreme Court erred in finding the error was not structural in nature.

Accordingly, for all of the reasons above, the Court concludes the Washington Supreme Court's determination that the trial court's error is not structural error is not contrary to nor does it involve an unreasonable application of clearly established Supreme Court law.

2. Harmless Error

Frost also argues the Washington Supreme Court's finding that the trial court's error is harmless is an "objectively unreasonable application of federal harmless error jurisprudence" under *Rose*, 478 U.S. 570 and *Neder*, 527 U.S. 1. Dkt. 21 at 21. The Court disagrees.

To grant habeas relief when a state court has found that a constitutional error was harmless, the Court must find (1) the state court's decision was contrary to, or an unreasonable application of, Supreme Court harmless error precedent, and (2) the defendant has suffered prejudice from the

constitutional error under the *Brecht* standard. *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005).

As to the first factor, Frost posits that under *Neder* whether a constitutional error is harmless "looks at 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Dkt. 21 at 21.

Frost argues the Washington Supreme Court "unreasonably applied this law" because "the state cannot prove that the verdict rendered was beyond a reasonable doubt, unattributable to the trial court's undue restriction on defense counsel's ability to argue a complete and legitimate defense." Dkt. 21 at 22. Specifically, he contends "unlike in *Neder*" the state did not present "overwhelming evidence" he was an accomplice and the state's burden of proof thus went uncontested because his lawyer was barred from arguing about accomplice liability. Frost further contends that "unlike in *Rose* the jury in his case was not required to find the 'predicate facts'" needed to prove the mental status for accomplice liability. *Id.*

These arguments are unpersuasive for the following reasons. First, Frost has not presented facts to support them.

Second, based on the record, this Court cannot say the Washington Supreme Court "unreasonably applied federal law" in concluding "in light of the *overwhelming evidence* of Frost's guilt and the fact the jury was properly instructed, the trial court's error was harmless." *Frost*, 160 Wash. 2d at 783 (emphasis added). The record establishes that:

(1) Frost gave police three taped confessions which were transcribed and entered into evidence at his trial. Dkt. 20, ex. 13 at 85.

(2) Frost's defense attorney's opening statement focused on the duress defense, admitting Frost's involvement in at least some of the crimes, even going so far as to say, "You will find from the evidence . . . that Joshua Frost is guilty of the robbery of Verna and Lloyd Gapp." Dkt. 20, ex. 8 at 128–30.

(3) Frost testified at trial that he was fearful of his co-defendant, (Matt Williams, a.k.a. Fatal), but described in detail his involvement in an eleven-day series of crimes for which he was charged as an accomplice. Frost testified that he drove Williams to the Gapp residence, to show him where it was prior to the night of the crime with knowledge that Williams planned the rob them (Dkt. 20, ex. 13 at 31–32), drove Williams to the Gapp residence on the night of the robbery (*Id.* at 36), entered the Gapp residence with Williams and the other co-defendants on the night of the robbery (*Id.* at 37), and removed money and guns from the Gapps' safe (*Id.* at 38).

Frost testified that he discussed the possibility of robbing a Taco Time restaurant with Williams because Frost used to manage another Taco Time and understood how their security system worked (*Id.* at 45), drove the co-defendants including Williams to the Taco Time with knowledge they planned to rob it, waited for them in the car and drove them away from the scene. *Id.* at 48–51.

Frost testified that he knew the co-defendants were planning to rob another store (the T and A robbery) and that he drove them around looking for a store, entered the store to assess whether the store

had security cameras and then waited in his car while the co-defendants robbed the store. *Id.* at 54–56.

Frost further testified that he was driving his co-defendants through West Seattle when Williams told him to stop at a 7/Eleven convenience store. Frost parked and waited out of sight while they robbed the 7/Eleven and he again drove them away from the scene. *Id.* at 60–61.

Frost testified he knew Williams to carry a bag containing items such as a ski mask and gloves that were used to commit crimes. *Id.* at 62. Frost discussed the guns carried by his co-defendants throughout his testimony. *Id.* at 36–65.

Frost testified that while driving away from the 7/Eleven robbery, Williams told him to go to another store called Ronnie's Market (*Id.* at 64) where again Frost waited in the parked car while his co-defendants robbed the store and he drove them away from the scene after hearing a gunshot. *Id.* at 65.

(4) Detective Broggi, who had investigated the string of robberies, obtained a search warrant for Frost's house and car. At trial, Detective Broggi testified about the evidence obtained from Frost's home, including loaded guns, a cash register, bank bags, a crow bar, a safe, and ski masks. Dkt. 20, ex. 9 at 124–37.

(5) The jury was properly instructed on both the prosecution's burden of proof and every element of accomplice liability. *Frost*, 160 Wash.2d at 782–83 (Washington Supreme Court's finding of proper jury instruction); Dkt. 17, ex. 20, app. D (jury instructions).

Against this evidence, Frost argues the Washington Supreme Court noted there was "an evidentiary basis, however, slim for counsel to argue that the State had failed to prove Frost participated on each of his accomplices' crimes with adequate knowledge." *Id.* at 778. But the state court made this statement in connection with whether the trial court abused its discretion in limiting counsel's closing argument, not as an acknowledgment that the evidence against Frost was weak.

Third, this Court cannot say that unlike in *Neder*, the state's burden of proof went uncontested solely because the trial court barred Frost's defense counsel from contesting accomplice liability. To the contrary, the record establishes that despite the limit placed on defense counsel's closing argument, Frost's lawyer nonetheless argued the state had failed to prove Frost was an accomplice. Frost's lawyer argued to the jury that on some counts the evidence of accomplice liability was uncontestable, but that on other counts the state failed to meets its burden of proof. Specifically, counsel argued:

> I think you can find Joshua Frost guilty of the Gapp robbery because that is just so overpowering, and he did go into the house. I think you can find Joshua Frost guilty of the T and A robbery not because he went in to do the robbery, but because he actually entered the store. And the only reason I think you could find him guilty of that is that it is kind of just too much to ask for somebody who is willing to take the step to let him off.
>
> And I know that is what you are thinking, some of you. But as to the cases in which he didn't go in anywhere and was just told to stay

> put, we are asking you find him not guilty, and even if you find him guilty he is not guilty of the guns. You can find him guilty of displaying the gun as an accomplice, I suppose, which is one of the things you have to find to make a robbery in the first degree. But that doesn't require you to find the special verdict firearm allegation in addition. You don't have to do that. And we hope you don't. And we think that the basis for not doing that is that the guns were out of his control.

Dkt. 20, ex. 13 at 182–83. Hence, contrary to Frost's contentions, the record shows defense counsel was able to and did argue the state had failed to prove Frost was an accomplice.

Fourth, the Court cannot say the Washington Supreme Court unreasonably applied *Rose*. In that case, Rose argued a jury instruction that shifted the burden of proof on the malice element of his murder charge violated his right to have his guilt proven beyond a reasonable doubt. *Rose*, 478 U.S. at 575. Frost contends the Washington Supreme Court unreasonably applied *Rose* because the jury in his case was not required to find the "predicate facts" needed to prove accomplice liability. Essentially, Frost is arguing the Washington Supreme Court's decision failed to reasonably apply the rule that the state has the burden to prove each element of every crime beyond a reasonable doubt.

The record does not support this contention. It is undisputed the jury in Frost's case was properly instructed on the issue of accomplice liability and the prosecution's burden of proof. *Frost*, 160 Wash.2d at 782–83 (Washington Supreme Court's determination of proper jury instruction); Dkt. 20, ex. 8 at 112–13

(transcript of trial court's initial instructions to the jury that every element of every charge is at issue and that each element must be found beyond a reasonable doubt); Dkt. 17, ex. 20, app. D (jury instructions). The jury was specifically instructed the prosecutor had the burden to prove all elements of accomplice liability beyond a reasonable doubt, and the jury did so. The prosecution argued in closing that the state had the burden to prove all of the elements of the crimes including the burden to prove Frost was an accomplice. Dkt. 20, ex. 13 at 148–60. Specifically, the prosecutor stated:

> Now I have divided my closing argument into two different parts. The reason for that, ladies and gentlemen, is there really are two parts in some ways you look at this. The first part has to do with the charges and the evidence and has the state proven all the elements and all of the crimes beyond a reasonable doubt. And then the second part has to do with the defense of duress, and this is important because the first part, again, the state has the burden. To get to duress you really have to find the state proves its case beyond a reasonable doubt . . . .
>
> Let's start first with the charges. We went through these in the beginning and I want to quickly go through them, because there is a lot of them, there is a lot of different robberies and a lot of different assaults.
>
> . . . .
>
> . . . . I will start off by talking about accomplice liability. The reason I will talk about that first is because that is really what this case is about in terms of the defendant's actions . . . .

> a person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not. The person is an accomplice in the commission of a crime if, with knowledge, that it will promote or facilitate the commission of a crime he . . . . aids or agrees to aid another person in planning or committing a crime. And the word aid means all assistance whether by words, acts, or encouragement.
>
> Well, the defendant has admitted that he knew what was going on. He knew that they were going to these stores, all of them, to commit a robbery. He knew they were armed and he knew that was the plan.

Id. at 148–151. And as discussed above, Frost's attorney argued the state had failed to prove Frost was an accomplice as to certain counts. Accordingly, the Court cannot say the Washington Supreme Court's determination that the error was harmless is an "objectively unreasonable" application of *Rose* because the record shows otherwise—the record shows the State was required to prove every element of each crime beyond a reasonable doubt.

The Supreme Court's jurisprudence has focused on the underlying fairness of the trial rather than on the "virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (internal citations omitted). When a reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt, an otherwise valid conviction should stand. *Id.* The Washington Supreme Court made such a determination regarding the trial court's erroneous limitation on

closing argument. The Court finds this determination is not an objectively unreasonable application of the Supreme Court's harmless error jurisprudence. Because the Washington Supreme Court's determination is not an objectively unreasonable application of the Supreme Court's harmless error jurisprudence, the issue of whether Frost was prejudiced under the *Brecht* standard need not be addressed at this time. *Inthavong*, 420 F.3d at 1059.[5]

3. Constitutionality of 28 U.S.C. § 2254

Frost also argues, in conjunction with claim 3, that to the extent § 2254(d) limits the Court's authority to grant relief, the Court should hold § 2254(d) unconstitutional. Dkt. 21 at 20. Frost contends that the United States Supreme Court has not squarely addressed this issue and that "several federal court judges, who have squarely addressed it, have concluded that the provision is unconstitutional." *Id.* Specifically, Frost argues that § 2254(d) (on its face and as applied) violates the separation of powers doctrine by limiting judicial review of federal habeas cases. *Id.* at 20–21.

Although the Supreme Court has not directly addressed the constitutionality of § 2254(d), the Ninth Circuit has done so in *Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007). In *Crater*, the Ninth Circuit specifically determined that AEDPA did not offend separation of powers because § 2254(d) "does not instruct courts to discern or deny a constitutional violation. Instead, it simply sets additional

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[5] *See also Fry v. Pliler*, 551 U.S. 112, 119-120 (2007) (recognizing that the *Brecht* standard is more onerous than review under AEDPA, thus a habeas claim that fails under AEDPA will also fail under *Brecht*).

standards for granting relief . . . where a petitioner has already received an adjudication of his federal claims by another court of competent jurisdiction. The Constitution does not forbid congress from establishing such standards . . . ." *Id.* at 1127. As the Court is bound by the Ninth Circuit's holding, the Court rejects Frost's argument that § 2254 is unconstitutional.

C. Claim 4: Vindictive Prosecution

Frost's contention that the prosecutor violated his due process rights by adding additional charges after Frost rejected a plea bargain lacks merit. Dkt. 14 at 13–14. Frost has never claimed the prosecutor in his case was actually vindictive. Instead, Frost presented this claim in the Washington Court of Appeals alleging there was a "realistic likelihood" of prosecutorial vindictiveness. Dkt. 17, ex. 2 at 3–7. The Washington Court of Appeals rejected this argument, finding (1) there is no presumption of vindictiveness in cases where a prosecutor adds charges during the pretrial phase when a defendant declined to accept a plea offer, and (2) that Frost had failed to demonstrate either "actual vindictiveness" or "a realistic likelihood of vindictiveness." Dkt. 17, ex. 5 at 6–10.

Without providing any legal authority, Frost essentially asks the Court to presume that by adding charges after Frost rejected a plea offer, the prosecution was vindictive. Dkts.14, 21. But the Supreme Court recognizes no such presumption. Rather the Supreme Court recognizes and accepts that the prosecutor's interest in the plea process is to persuade the defendant to waive his constitutional right to stand trial. *United States v. Goodwin*, 457 U.S. 368, 378 (1982). Plea bargaining thus

represents a "give-and-take" in which "a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial" and "may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." *Id.* at 380.

"To hold that the prosecutor's desire to induce a guilty plea . . . may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself." *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978). The Supreme Court has thus expressly declined to create a presumption of vindictiveness in cases where a prosecutor adds charges during the pretrial phase when a defendant declined to accept a plea offer.[6] *See Goodwin*, 457 U.S. at 384; *Bordenkircher*, 434 U.S. at 365.

The facts of Frost's case are thus in line with *Bordenkircher* where the prosecutor also warned the defendant that he would add charges if the defendant did not accept the plea deal. *Id.* at 358–60. As such, the Washington Court of Appeals' decision is not contrary to clearly established federal law because it came to the same conclusion as the Supreme Court on materially indistinguishable facts. *Williams*, 529 U.S. at 405–06. Nor is it an "unreasonable application of clearly established federal law" because it correctly identified the

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[6] This determination contrasts with the Supreme Court's creation of a presumption of vindictiveness in cases involving retrials. *See North Carolina v. Pearce*, 395 U.S. 711 (1969); *Blackledge v. Perry*, 417 U.S. 21 (1974). Subsequent Supreme Court jurisprudence expressly declines to extend this presumption to the pretrial phase. *See Goodwin*, 457 U.S. 368; *Bordenkircher*, 434 U.S. 357 (1978).

guiding legal principles and applied them in a way that aligns with *Bordenkircher*. *Id.* Accordingly, the Court concludes that claim 4 is not a basis for relief under § 2254.

D. Request for Evidentiary Hearing

Frost requests an evidentiary hearing on claims 1 and 2, the *Brady* and *Napue* claims. Dkt. 21 at 35. Under § 2254(e)(2), a district court presented with a request for an evidentiary hearing must first determine whether a factual basis exists in the record to support a petitioner's claims and, if not, whether an evidentiary hearing "might be appropriate." *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999). A federal evidentiary hearing is unnecessary where the record refutes a petitioner's factual allegations or otherwise precludes habeas relief. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *Baja*, 187 F.3d at 1078. An evidentiary hearing is not required unless the petitioner alleges facts which, if proved, would entitle him to relief. *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

As previously discussed, claims 1 and 2 are procedurally defaulted. As these claims are not properly before the Court and fail as a matter of law on habeas review, an evidentiary hearing is not required. *See, e.g., Landrigan*, 550 U.S. at 481. Accordingly, the Court denies Frost's request for an evidentiary hearing.

E. Motion for Discovery

Additionally, Frost has filed a motion for discovery under Rule 6 of the Rules Governing § 2254 Cases. Dkt. 25. Specifically, Frost seeks further discovery related to his *Brady* and *Napue* claims that the prosecutor withheld evidence and

elicited false testimony from trial witness Edward Shaw. *Id.* Frost seeks permission to serve subpoenas on the King County Prosecutor's Office, King County Sheriff, Federal Way Police Department, Washington State Department of Corrections, Valley Narcotics Enforcement Team, and Washington State Department of Social and Health Services, including the Juvenile Rehabilitation Administration and Child Protective Services, seeking production of documents regarding himself and trial witness Edward Shaw. Respondent filed a response opposing the request (Dkt. 28) and Frost filed a reply (Dkt. 29). Having considered the parties' submissions, the governing law, and the remainder of the record, the Court recommends that Frost's motion for discovery (Dkt. 25) be denied.

Rule 6 provides that the court may, "for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure." Good cause exists where "'specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief.'" *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). A habeas petitioner is not presumptively entitled to conduct discovery; rather, discovery is available only in the discretion of the court and for good cause shown. *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999). A habeas petition "was never meant to be a fishing expedition for habeas petitioners to 'explore their case in search of its existence.'" *Id.* at 1067 (quoting *Calderon v. U.S. Dist. Court for the N. Dist. Of Cal.*, 98 F.3d 1102, 1106 (9th Cir. 1996)).

Frost asserts that he has shown good cause to conduct discovery because the requested discovery may show that he is entitled to relief on his first and second grounds for relief, that his Sixth and Fourteenth Amendment rights were violated when the prosecution knowingly withheld material exculpatory evidence regarding a trial witness Edward Shaw, and knowingly elicited false testimony from Shaw. Frost states that he has uncovered evidence establishing these claims and, "[b]ased on the State's concealment of this evidence, Petitioner believes it is likely there is additional impeachment evidence regarding Edward Shaw that has not yet been disclosed and that Petitioner has been unable to uncover through his own efforts." Dkt. 25 at 4. Frost also states that he requested records from the King County Prosecutor's Office, but was only allowed to inspect portions of the files, and that the Washington Supreme Court denied the motion for discovery he filed in state court. *Id.* at 4–5.

Respondent argues in opposition that because Frost's first and second claims are procedurally barred, Frost may not obtain review of the merits of the claims and thus cannot show good cause to conduct discovery on them. Dkt. 28 at 3. The Court agrees. In order to show "good cause" under Rule 6, a petitioner must demonstrate that he may be entitled to relief if the facts are fully developed. *Bracy*, 520 U.S. at 909. A petitioner cannot satisfy this requirement with respect to a claim that is procedurally barred. *See Sherman v. McDaniel*, 333 F. Supp.2d 960, 969–70 (D. Nev. 2004); *see also Rucker v. Norris*, 563 F.3d 766, 771 (8th Cir. 2009); *Williams v. Bagley*, 380 F.3d 932, 975 (6th Cir. 2004). This is because a petitioner cannot obtain federal

habeas review of, and thus cannot obtain relief on, a procedurally barred claim. *Coleman*, 501 U.S. at 750. In effect, a procedurally barred claim is not before the Court for consideration on the merits. The Court will not order discovery on a claim that is not properly before it.

Frost argues in his reply that he has in fact shown good cause because discovery is needed to develop the facts before the Court can consider the issue of procedural default. Dkt. 29 at 2. Frost relies on *Quezada v. Scribner*, 611 F.3d 1165 (9th Cir. 2010) (per curiam). In that case, the district court had found that Quezada had failed to provide any factual support for his *Brady* claim. On appeal, Quezada sought remand based on newly discovered evidence, discovered after the conclusion of the district court proceedings. *Id.* at 1166. The Ninth Circuit held that Quezada was entitled to an evidentiary hearing on his *Brady* claim because he had set forth substantial allegations of newly discovered evidence that he could not have discovered earlier through the exercise of reasonable diligence, and he had alleged facts that, if proven, would entitle him to relief. *Id.* at 1166–67 (citing *Townsend*, 372 U.S. at 313). The Ninth Circuit remanded with directions to conduct an evidentiary hearing. The Ninth Circuit further directed the district court to, after conducting the evidentiary hearing, determine whether the new facts rendered Quezada's *Brady* claim unexhausted, and, if so, to consider whether the claim was procedurally barred. *Id.* at 1168.

Quezada is inapposite to the case at hand. That case involved newly discovered evidence that *Quezada* could not have discovered at the time of the

state court proceedings, or even before conclusion of the district court proceedings. Factual development of the record was thus necessary before the district court could consider the issues of exhaustion and procedural default. Here, the factual basis of Frost's first and second claims was discoverable prior to the time he first presented the claims. Frost presented evidence related to his first and second claims to the state courts, which concluded that the claims were time-barred. Under these circumstances, the Court need not further develop the facts to determine whether Frost's claims are procedurally barred.

In any event, even if Frost's first and second claims were not procedurally barred and were properly before the Court, Frost has not shown good cause to conduct discovery. Frost states in his motion that he believes there is "additional impeachment evidence regarding Edward Shaw that has not yet been disclosed." Dkt. 25 at 4. Frost seeks records not just related to benefits Shaw may have received in the underlying criminal case, but also any records related to Shaw in the possession of other law enforcement agencies, the Department of Corrections, and the Department of Social and Health Services. As Frost states in his reply, he seeks evidence of "additional *Brady* material that may demonstrate Petitioner is entitled to relief." Dkt. 29 at 4. Frost essentially seeks to use discovery to explore the existence of additional or even more far-reaching *Brady* violations that those alleged in his current claims. That is an improper use of discovery in habeas proceedings. *See Rich*, 187 F.3d at 1067.

The Court has concluded that Frost's first and second claims are procedurally barred. Further

factual development would not show that Frost is entitled to proceed on these claims. In addition, Frost seeks discovery in order to explore the existence of previously undiscovered claims. This is beyond the scope of permissible discovery under Rule 6. Frost thus has not shown good cause to conduct discovery on these claims—his motion for discovery (Dkt. 25) should be denied.

F. Certificate of Appealability

A prisoner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of the petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A COA may be issued only where a petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under this standard, the Court finds that no reasonable jurist would conclude Frost's claims 1, 2 and 4 have merit or deserve encouragement to proceed further. Accordingly, the Court recommends, pursuant to Rule 11 of the Rules Governing § 2254 cases, the district court deny issuance of a COA on these claims if it dismisses Frost's § 2254 petition. However, the Court finds jurists of reason could disagree with the Court's resolution of claim 3 and thus recommends that a COA be issued for claim 3. Frost should address whether a COA should be issued as to claims 1, 2

and 4 in his written objections, if any, to this Report and Recommendation.

CONCLUSION

For the reasons set forth above, the Court recommends that Frost's § 2254 habeas petition (Dkt. 14) be **DENIED** and this action be **DISMISSED** with prejudice. Frost has not shown good cause to conduct discovery on these claims. Accordingly, his motion for discovery (Dkt. 25) should be **DENIED**. A proposed order accompanies this Report and Recommendation.

DATED this 5th day of October, 2010.

s/ BRIAN A. TSUCHIDA
Brian A. Tsuchida
United States Magistrate Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSHUA JAMES FROST, Petitioner.	No. 77447-7 En Banc Filed Jun 28 2007

J. M. JOHNSON, J. — The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[1] This right to counsel encompasses the delivery of closing argument.[2] Although trial courts possess discretion over the scope of closing argument, a limitation that goes too far may infringe upon a defendant's Sixth Amendment right to counsel. When a court's limitation of argument relates to a fact necessary to support a conviction, the defendant's due process rights may also be implicated. Such constitutional infringements occurred in the present case when the trial court precluded petitioner Joshua Frost's counsel from arguing both that the State failed to prove accomplice liability as to Frost's robbery offenses and that Frost participated in these offenses under duress. Therefore, the trial court abused its discretion. However, under the particular

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[1] U.S. CONST. amend. VI.

[2] *Herring v. New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

circumstances of this case, the trial court's error may be deemed harmless. Accordingly, we affirm the decision of the Court of Appeals, although under a different rationale.

FACTS AND PROCEDURAL HISTORY

Frost's criminal conduct involved five discrete incidents over 11 days. First, on April 8, 2003, Frost, together with accomplices Matthew Williams and Alexander Shelton, robbed and burglarized the home of Lloyd and Verna Gapp. Frost acted as the driver and also entered the home with Williams and Shelton. Firearms were used.

On April 12, 2003, Frost acted as the driver for Shelton and Williams, who robbed a Taco Time restaurant while armed with firearms. Then on April 15, 2003, Frost, Williams, Shelton, and another man participated in the robbery of T and A Video. Frost again acted as the driver and also performed surveillance of the video store prior to the robbery. On April 17, 2003, Frost acted as the driver for Williams and Shelton, who robbed a 7/Eleven store at gunpoint. During this robbery, one accomplice threatened two customers in the store's parking lot with a gun. Immediately following this robbery, Frost drove Williams and Shelton to Ronnie's Market, which they also robbed using firearms. During the course of this robbery, employee Heng Chen was shot in the hand.

Frost, Williams and Shelton were arrested on April 20, 2003. Several firearms, a cash register, safes, bank bags, and ski masks associated with the above offenses were found inside Frost's home. Frost made multiple confessions to the police regarding the above offenses, recordings of which were introduced at trial. Ultimately, Frost was charged with six

counts of robbery, one count of burglary, one count of attempted robbery, and three counts of assault; most charges included firearms enhancements.

Prior to trial, Frost moved to suppress his statements to the police; the court denied his motion and admitted the confessions. Frost testified at trial. He generally admitted participating in the robberies but claimed he acted under duress.

During a discussion of the proposed jury instructions, Frost's counsel indicated he intended to argue both that the State failed to meet its burden as to accomplice liability and that Frost acted under duress in committing the charged robbery offenses. The State objected to this form of argument. The trial court ruled that defense counsel could not argue both theories in closing, citing *State v. Riker*, 123 Wash.2d 351, 869 P.2d 43 (1994). Verbatim Report of Proceedings (VRP) (DEC. 11, 2003) at 126-28. The court informed defense counsel that if he attempted to argue that the State had failed to meet its burden of proof as to any of the robbery offenses, then the court would not instruct the jury on duress as to those offenses. *Id.* at 126. Defense counsel objected to the court's ruling. In closing, defense counsel did not argue that the State had failed to meet its burden of proof as to Frost's robbery offenses. Instead, defense counsel limited his argument to the affirmative defense of duress.

In closing, the prosecutor repeatedly mentioned the State's burden of proof as to Frost's robbery offense. *Id.* at 148-49, 152, 160. Likewise, the jury was properly instructed on the State's burden of proof in general, as well as the requirements to prove accomplice liability in particular. *See* Clerk's Papers (CP) at 178, 180. A jury found Frost guilty of all the charged offenses

except one assault. Frost was sentenced to more than 50 years' imprisonment, including the consecutive firearms enhancements.

Frost appealed his convictions to Division One of the Court of Appeals. His claims included (1) prosecutorial vindictiveness, (2) erroneous admission of his statements, and (3) erroneous limitation of defense counsel's argument of inconsistent defenses. In an unpublished decision, the Court of Appeals rejected all of Frost's claims. *State v. Frost*, noted at 128 Wash. App. 1026, 2005 Wash. App. LEXIS 1570. Review by this court was granted only on the issue of the trial court's limitation of defense counsel's closing argument. *State v. Frost*, 158 Wash.2d 1001, 143 P.3d 828 (2006).

ANALYSIS

A. Standard of Review

This court reviews a trial court's action limiting the scope of closing argument for abuse of discretion. *State v. Perez-Cervantes*, 141 Wash.2d 468, 475, 6 P.3d 1160 (2000). This court will find that a trial court abused its discretion "'only if *no reasonable person* would take the view adopted by the trial court.'" *Id.* (quoting *State v. Huelett*, 92 Wash.2d 967, 969, 603 P.2d 1258 (1979)).

B. Trial Court Authority to Limit the Scope of Closing Argument

At trial, Frost's counsel sought to argue both that the State failed to prove accomplice liability as to Frost's robbery offenses and that Frost acted under duress in committing these offenses. The trial court ruled, relying on language in this court's decision in *Riker*, 123 Wash.2d 351, that defense counsel could not argue these inconsistent theories in

closing. Frost now argues that the trial court abused its discretion and violated his constitutional rights by limiting the scope of his counsel's closing argument. The State counters that the trial court acted within its discretion.

We hold that the trial court erroneously interpreted our decision in *Riker* and, based on that erroneous interpretation, unduly limited the scope of Frost's counsel's closing argument, thus abusing its discretion. However, we ultimately conclude that the trial court's error was harmless.

1. *Trial courts possess discretion to limit the scope of closing argument; however, undue limitations may infringe upon defendants' Sixth Amendment and due process rights*

It is well established that trial courts possess broad discretionary powers over the scope of counsel's closing arguments. *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); *Perez-Cervantes*, 141 Wash.2d at 474-75; *City of Seattle v. Erickson*, 55 Wash. 675, 677, 104 P. 1128 (1909). As explained by this court:

> "The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. . . . He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion."

Perez-Cervantes, 141 Wash.2d at 474-75 (quoting *Herring*, 422 U.S. at 862). This court has emphasized that "trial court should 'in all cases . . . restrict the argument of counsel to the facts in evidence.'" *Id.* at 475 (alteration in original) (quoting *Sears v. Seattle C. S. R. Co.*, 6 Wash. 227, 233, 33 P.

389, 33 P. 1081 (1893)). "Counsel's statements also must be confined to the law as set forth in the instructions to the jury." *Id.*

However, despite their broad discretion, trial courts "cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." *City of Seattle v. Arensmeyer*, 6 Wash. App. 116, 121, 491 P.2d 1305 (1971). Moreover, it is generally permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence. *See Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988); *State v. Fernandez-Medina*, 141 Wash.2d 448, 458-60, 6 P.3d 1150 (2000); *State v. Conklin*, 79 Wash.2d 805, 807, 489 P.2d 1130 (1971). Where a trial court goes too far in limiting the scope of closing argument, a defendant's constitutional rights may be implicated.

For instance, the United States Supreme Court has held that the Sixth Amendment right to counsel encompasses the delivery of a closing argument. *Herring*, 422 U.S. at 858. The Court explained:

> There can be no doubt that closing argument for the defense is the basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.

Id. This court has also held that the constitutional right to be represented by counsel includes the right of counsel to argue the case to the jury. *See*

Erickson, 55 Wash. at 677; *State v. Mayo*, 42 Wash. 540, 548-49, 85 P. 251 (1906). Likewise, this court has recognized the particular importance of closing argument to the effective exercise of this right. *Perez-Cervantes*, 141 Wash.2d at 474. Thus, where a trial court unduly limits the scope of defense counsel's closing argument, it may infringe upon a defendant's Sixth Amendment right to counsel.

Improper limitation of closing argument may also infringe upon a defendant's Fourteenth Amendment due process rights as set forth in *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Due process requires that the State prove every fact necessary to constitute a charged offense beyond a reasonable doubt. *Id.*; *State v. McHenry*, 88 Wash.2d 211, 214, 558 P.2d 188 (1977). Where a trial court limits argument as to any fact necessary to constitute a charged offense, the trial court may lessen the State's constitutionally required burden, thus, implicating a defendant's due process rights. *See Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (concluding that trial court's action in limiting scope of argument as to element of crime "relieved the prosecution of its burden to prove its case beyond a reasonable doubt").

2. *The trial court erred in interpreting* Riker *to preclude a defendant from arguing alternatively duress and that the State failed to meet its burden of proof*

Duress is an affirmative defense, which the defendant must prove by a preponderance of the evidence. *Riker*, 123 Wash.2d at 368-69. As an affirmative defense, duress does not function to negate an element of the charged offense. *Id.* at 367-68. Rather, a finding of duress excuses the defendant's otherwise unlawful conduct. *Id.*

Washington law specifically provides for the defense of duress at RCW 9A.16.060.[3]

In the present case, the trial court ruled as follows regarding the interplay between the defense of duress and the State's burden of proof:

> THE COURT: You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. *Riker* is very clear on this. You must admit the elements of the offense have been proved before you can use the duress offense.
>
> [DEFENSE]: But am I not permitted to argue in the alternative, using duress and failure to prove in the alternative?
>
> THE COURT: No. Duress is an affirmative defense. To quote *Riker*, a defense of duress admits that the defendant committed the unlawful act but pleas an excuse for doing so. You may not argue both. *Riker* wouldn't stand up if that was the ability the defense has. Once the state proves its charges the defense says it is proved and that is when you get an opportunity to raise this

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[3] RCW 9A.16.060 provides, in relevant part:

(1) In any prosecution for a crime, it is a defense that:

(a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

(b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved.

> affirmative defense and prove it by a preponderance. I don't see any other way to write it. There are pages and pages about this.

VRP (Dec. 11, 2003) at 126-27. We reject the trial court's overbroad interpretation of our decision in *Riker*. In *Riker*, this court held that duress is an affirmative defense that the defendant must prove by a preponderance of the evidence. 123 Wash.2d at 368-69. In reaching this decision, this court stated, "a defense of duress *admits* that the defendant committed the unlawful act, but pleads an excuse for doing so." *Id.* at 367-68. This court also stated, "a duress defense necessarily allows for no doubt that the defendant did the acts charged." *Id.* at 368. These statements were made in the course of rejecting the defendant's claim that she need only prove duress "'to the extent of creating a reasonable doubt in the minds of the jurors as to the [defendant's] guilt . . . .'" *Id.* at 367 (alteration in original) (quoting *State v. Bromley*, 72 Wash.2d 150, 155, 432 P.2d 568 (1967)). Specifically, these statements were made in support of this court's conclusion that because "[a] successful duress defense does not create a reasonable doubt that the defendant did the crime charged, but rather condones the defendant's admittedly unlawful conduct. Any burden of proof for duress which literally relies on the ability of the defendant to create a reasonable doubt would . . . be impossible to meet." *Id.* at 368. Nothing in the *Riker* opinion was directed toward answering the question presented in the case at bar. Yet, the trial court and the Court of Appeals treated this case as though it were dispositive. *See* VRP (Dec. 11, 2003) at 126-27; *Frost*, 2005 Wash. App. LEXIS 1570, at *24.

Besides *Riker*, the Court of Appeals relied on this court's decision in *State v. Mannering*, 150 Wash.2d 277, 75 P.3d 961 (2003), to affirm the trial court. *Frost*, 2005 Wash. App. LEXIS 1570, at *23-24. In *Mannering*, this court addressed the defense of duress in the context of an ineffective assistance of counsel claim. 150 Wash.2d at 286-87. As part of our rationale for denying defendant's claim, this court concluded that the failure to pursue the defense of duress was strategic. *Id.* Specifically, this court reasoned that defendant's counsel could reasonably have decided not to raise duress because doing so would have required the defendant "to admit all of the elements of the underlying crimes," an admission that would have been inconsistent with the defendant's theory that "she lacked the intent to commit the attempted murder." *Id.* at 287. However, this court did not hold that such inconsistent defenses would have been impermissible had defense counsel sought to raise them.

In sum, neither *Riker* nor *Mannering* is dispositive as to the question presented in this case. While there is language in both opinions suggesting that a successful duress defense requires admitting the commission of acts constituting a crime, these cases do not necessarily stand for the proposition that a defendant must concede criminal liability to claim duress. To require such a concession would arguably run afoul of the due process requirement that the State prove each element of a charged offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358; *Conde*, 198 F.3d 734. Likewise, it would infringe upon a criminal defendant's Sixth Amendment right to have counsel make argument to the jury, at least where duress is

only one of the viable defense theories. *See Herring*, 422 U.S. 853.

In light of the above constitutional concerns, we reject the reading of *Riker* and *Mannering* adopted below and narrowly interpret this precedent as applied to the present case. Instead, we conclude that *Riker* stands for the proposition that a duress defense admits the unlawful act or conduct, not the crime itself.[4]

In sum, we hold that while a defendant may be required to admit that he committed acts constituting a crime in order to claim duress, he or she is not required to concede criminal liability. The trial court erred in ruling to the contrary.

3. Due process and the Sixth Amendment required his counsel be permitted to argue that the State failed to prove accomplice liability despite Frost's inconsistent testimony

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[4] A similar distinction between admitting the acts on which a charge is based and admitting criminal liability has been drawn by the Court of Appeals in its analysis of the affirmative defense of entrapment. *See State v. Galisia*, 63 Wn. App. 833, 836-37, 822 P.2d 303, *review denied*, 119 Wash.2d 1003 (1992). In *Galisia*, the court concluded that while its earlier decision in *State v. Matson*, 22 Wn. App. 114, 587 P.2d 540 (1978), and *State v. Draper*, 10 Wn. App. 802, 521 P.2d 53 (1974), may require a defendant to admit the charged acts, they do not require admission of "the crime itself or all the elements of a crime before being entitled to an entrapment instruction." *Galisia*, 63 Wn. App. at 837; *see also Mathews*, 485 U.S. at 62 (holding that "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment").

Based on its erroneous interpretation of *Riker*, 123 Wash.2d 351, the trial court precluded Frost's counsel from arguing both that the State failed to meet its burden as to accomplice liability and that Frost acted under duress. Determining whether this limitation on the scope of counsel's argument constituted an abuse of discretion requires further inquiry into the evidence before the court, as well as the constitutional ramifications of the court's ruling.

Frost entered a plea of not guilty to all of his offenses. As explained by this court in *Conklin*, "[a] plea of not guilty permits all defenses, excepting insanity and prior conviction or acquittal." 79 Wash.2d at 807. In light of such a plea, "[t]he state must prove each necessary element of the offense charged beyond a reasonable doubt, and defendant may challenge the state's proof at every turn." *Id.* Imposing a limitation on closing argument that prevents a defendant from challenging the State's burden may implicate due process. *See Conde*, 198 F.3d at 739, 741.

A trial court has the discretion, indeed the duty, "'to restrict the argument of counsel to the facts in evidence.'" *State v. Woolfolk*, 95 Wash. App. 541, 548, 977 P.2d 1 (1999) (quoting *Sears*, 6 Wash. at 233). However, the court "cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." *Arensmeyer*, 6 Wash. App. at 121. To attempt to compel such logic in closing argument may implicate a defendant's Sixth Amendment right to counsel. The trial court's ruling in the present case constituted an abuse of discretion in that it infringed upon both Frost's due process and Sixth Amendment rights.

Given the State's theory of this case, whether Frost was an accomplice to the charged robbery offenses was a necessary finding to support his convictions. *See State v. Carter*, 154 Wash.2d 71, 81, 109 P.3d 823 (2005). Hence, in accordance with due process, the State was required to prove the elements of accomplice liability, beyond a reasonable doubt, as to each offense. *See In re Winship*, 397 U.S. at 364. By preventing counsel from arguing this point in closing, the trial court lessened the State's burden to some degree; thus, the court infringed upon Frost's due process rights. *See Conde*, 198 F.3d at 739, 741.

Moreover, while the argument that the State failed to meet its burden as to accomplice liability may have appeared illogical in light of Frost's trial testimony, the trial court did not have authority to compel counsel to argue logically. *See Arensmeyer*, 6 Wash. App. at 121. As explained by the United States Supreme Court in *Herring*:

> "The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right."

422 U.S. at 860 (quoting *Yopps v. State*, 228 Md. 204, 207, 178 A.2d 879 (1962)). Admittedly, the State's evidence of accomplice liability in this case was particularly strong. Yet there remained an evidentiary basis, however slim, for counsel to argue that the State failed to prove Frost participated in

each of his accomplices' criminal acts with adequate knowledge of promotion or facilitation. *See* RCW 9A.08.020(3)(a) (requirements for accomplice liability). This argument is best illustrated by the robberies in which Frost was only a driver and remained in the car. As this court and the Supreme Court have recognized, closing argument "is the defendant's 'last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.'" *Perez-Cervantes*, 141 Wash.2d at 474 (quoting *Herring*, 422 U.S. at 862). Because the trial court unduly limited this aspect of Frost's defense, it infringed upon his Sixth Amendment right to counsel.

In sum, the trial court's misinterpretation of our decision in *Riker* resulted in the imposition of an undue limitation on the scope of defense counsel's closing argument. This limitation infringed upon Frost's due process and Sixth Amendment rights. Thus, the trial court abused its discretion.

C. Harmless Error

The State posits that, assuming the trial court abused its discretion in limiting the scope of counsel's argument, its error was harmless. Frost counters that, first, harmless error review is not appropriate and, second, the trial court's error was not harmless. We hold that harmless error review is appropriate. We further hold that, under the circumstances presented, most notably the jury instructions on burden of proof for accomplice liability, the trial court's error in limiting defense counsel was harmless.

1. The trial court's error in limiting the scope of defense counsel's closing argument was not structural; thus, harmless error review is appropriate

Structural errors—"defect[s] affecting the framework within which the trial proceeds"—are not subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). In contrast, trial errors—those affecting "the trial process itself"—may be reviewed for harmless error. *Id.* Frost argues that the trial court's error in the present case "is akin to a faulty reasonable doubt instruction" and, thus, should be deemed structural in accordance with *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Suppl. Br. of Pet'r at 15. Frost also encourages this court to deem the trial court's error structural in light of the Supreme Court's recent decision in *United States v. Gonzalez-Lopez*, __ U.S. __, 126 S. Ct. 2557, 2564, 165 L. Ed. 2d 409 (2006) (holding denial of Sixth Amendment right to counsel of choice not subject to harmless error analysis). We reject both of Frost's arguments.

First, this court has previously rejected an argument analogous to that made by Frost in the context of an erroneous accomplice liability instruction. *See State v. Brown*, 147 Wash.2d 330, 339, 58 P.3d 889 (2002) (holding erroneous accomplice liability instruction subject to harmless error analysis because "not every omission or misstatement in a jury instruction relieves the State of its burden"). Moreover, the reasoning from *Sullivan* relied upon by Frost was substantially limited by the Supreme Court in *Neder v. United States*, 527 U.S. 1, 11-13, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), where harmless error analysis was

applied to affirm a conviction. Particularly in light of the fact that the jury here was properly instructed as to the State's burden,[5] Frost's analogy to *Sullivan* must be rejected.

Frost's attempted analogy to *Gonzalez-Lopez* also fails. In that case, the Supreme Court reasoned that deprivation of the right to counsel of choice is a structural error because its "'consequences . . . are necessarily unquantifiable and indeterminate.'" 126 S. Ct. at 2564 (quoting *Sullivan*, 508 U.S. at 282). The Court elaborated:

> Different attorneys will pursue different strategies . . . [a]nd the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds."

Id. at 2564-65 (quoting *Fulminante*, 499 U.S. at 310). In contrast to the situation in *Gonzalez-Lopez*, a harmless error inquiry in the present case would not require this court to speculate as to "myriad aspects of representation." *Id.* at 2564. Frost does not complain of his counsel generally, only of a single aspect of representation—one part of closing argument as to proof of accomplice liability. This court is as equipped to assess whether the trial court's mistake in limiting closing argument affected the outcome of this case as it is to conduct other harmless error analyses, such as those regarding an erroneous instruction or evidentiary decision.

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[5] CP at 178.

The dissent would hold that the trial court's error is structural and, thus, requires automatic reversal rather than application of harmless error analysis. Dissent at 1. This position fails to appreciate the limits of the structural error analysis. As recently reiterated by the Supreme Court in *Washington v. Recuenco*, 126 S. Ct. 2546, 2551, 165 L. Ed. 2d 466 (2006) (quoting *Neder*, 527 U.S. at 8, 9):

> "[M]ost constitutional errors can be harmless. [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless error analysis. Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."

(alterations in original) (footnote and citations omitted) (internal quotation marks omitted). Those "rare cases" in which the Supreme Court has deemed an error structural have involved a complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, and a defective reasonable-doubt instruction. *Recuenco*, 126 S. Ct. at 2551 n.2. In contrast, the error in the present case is not so egregious as to require automatic reversal.

The right to make argument through counsel is unquestionably fundamental, but the scope of argument may be limited by the trial court. Such a limitation does not necessarily "'render[] a criminal trial fundamentally unfair or an unreliable vehicle

for determining guilt or innocence.'" *Recuenco*, 126 S. Ct. at 2551 (quoting *Neder*, 527 U.S. at 9). Rather, an erroneous limitation of the scope of closing argument merely affects the "trial process itself," *Fulminante*, 499 U.S. at 310, and is analogous to the numerous other constitutional errors identified by the Supreme Court as subject to harmless error analysis. *Id.* at 306-07 (listing errors subject to harmless error analysis including: jury instruction misstating an element of the offense; erroneous exclusion of a defendant's testimony regarding circumstances of his confession, restriction on a defendant's right to cross-examine a witness for bias, denial of a defendant's right to be present at all critical stages, and denial of counsel at a preliminary hearing). Accordingly, we hold that the trial court's error in limiting the scope of closing argument in the present case was not structural and is subject to harmless error analysis.

2. Under the circumstances of this case, the trial court's error was harmless

This court has adopted the "overwhelming untainted evidence" test as the proper standard for harmless error analysis in Washington. *State v. Guloy*, 104 Wash.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). "Under the 'overwhelming untainted evidence' test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.* A finding of harmless error requires proof beyond a reasonable doubt that "any reasonable jury would have reached the same result in the absence of the error." *Id.* at 425.

Here the trial court's action did not taint the evidence before the jury in any way, as counsel's

argument is not evidence. Thus, all the evidence of Frost's guilt, including his three taped confessions and his trial testimony, may be considered in determining whether the trial court's error was harmless. Given this evidence, we must conclude beyond a reasonable doubt that "any reasonable jury" would have convicted Frost, even absent the trial court's limitation on counsel's argument. *Guloy*, 104 Wash.2d at 425; *see also State v. Berube*, 150 Wash.2d 498, 509, 79 P.3d 1144 (2003) (upholding finding of harmless error as a result of erroneous accomplice liability instruction, in part, because "the record clearly support[ed] a finding that the jury verdict of conviction would be the same absent the error"). The fact the jury was properly instructed on the State's burden of proof in general,[6] as well as instructed on the specific burden of proof to establish accomplice liability,[7] supports the conclusion that the trial court's error was harmless.

CONCLUSION

We affirm Frost's conviction and the decision of the Court of Appeals, but under a different rationale. Specifically, we hold that while a defendant may be required to admit that he committed acts constituting a crime in order to claim duress, he is not required to concede criminal liability. In ruling to the contrary and limiting defense counsel's argument, the trial court abused its discretion. However, in light of the overwhelming evidence of Frost's guilt and the fact the jury was properly instructed, the trial court's error was harmless.

s/ J. M. Johnson, J.

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[6] CP at 178.

[7] CP at 180.

WE CONCUR:

s/ _____	s/ Bridge, J.
s/ _____	s/ Chambers, J.
s/ _____	s/ Owens, J.
s/ _____	s/ Fairhurst, J.

No. 77444-7

SANDERS, J. (dissenting)—The majority holds the trial court improperly limited Joshua Frost's closing argument and therefore violated his Sixth Amendment right to counsel. Nevertheless, the majority claims the error was harmless. But a trial court cannot limit a defendant from arguing a legitimate defense; such action renders the entire trial unfair. We should hold this is structural error and remand for a new trial.

The United States Supreme Court has held a trial court's refusal to allow defense counsel to present any closing argument violates the Sixth Amendment because denying a defendant the opportunity to make final arguments on his theory of the defense denies him the right of effective assistance of counsel. *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). When discussing the importance of a closing argument, the Court said:

> The very premise of our adversary system of criminal justice is the partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy

> could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Id. The majority relies on *Herring*, among other cases, to say, "Thus, where a trial court unduly limits the scope of defense counsel's closing argument, it may infringe upon a defendant's Sixth Amendment right to counsel." Majority at 8. But this language is too weak—"may" connotes such an error might not affect a defendant's Sixth Amendment right when in reality it must affect that right. A trial court is "given great latitude in controlling the duration and limiting the scope of closing summations." *Herring*, 422 U.S. at 862. But if a trial judge *unduly* limits the closing argument, then he has strayed outside those wide boundaries and most certainly has violated the defendant's constitutional rights. That violation can never be harmless.

An error is structural—and not harmless—when it "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed 2d 302 (1991). The entire framework of Frost's trial was tainted because the jury was not privy to his full defense. No aspect of an attorney's advocacy "could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Herring*, 422 U.S. at 862. Only then can we have any reasonable assurance "the guilty [will] be convicted and the innocent [will] go free." *Id.* In *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), the Supreme Court held a defective reasonable double instruction demanded automatic reversal because it "vitiates *all* the jury's findings." Here too this error

vitiates the jury's findings because we cannot know what the jury would have decided but for defense counsel's final arguments.

Nevertheless, the majority looks to the "'overwhelming untainted evidence'" test to claim the error was harmless. Majority at 22. But we are concerned here with arguments—not evidence. A jury interprets and understands the evidence through the lens of the attorneys' final arguments. We cannot determine what evidence is or is not tainted because we do not know how the jury would have interpreted the evidence in light of the proposed arguments. If "it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors," *State v. Robinson*, 24 Wash.2d 909, 917, 167 P.2d 986 (1946), surely too, it is impossible for courts to contemplate the probabilities of a defendant's closing argument had upon the minds of the jurors.

In facts similar to these, the Ninth Circuit Court of Appeals held it is structural error when a court erroneously precludes the jury from hearing a defendant's full theory of the case. *Conde v. Henry*, 198 F.3d 734, 741 (9th Cir. 1999). In *Conde v. Henry*, Conde had two inconsistent defenses to his kidnapping charge: (1) he was innocent of all charges; or (2) alternatively, if he was guilty of kidnapping, it was for purposes of burglary and not for robbery. *Id.* at 737. The trial judge refused to allow Conde to argue in closing there had not been a kidnapping. The Court said: "By preventing Conde from arguing that no robbery had occurred and that he lacked the requisite intent to rob, the trial court's order violated the defendant's fundamental right to assistance of counsel and right to present a defense, and it relieved the prosecution of its burden to prove

its case beyond a reasonable doubt." *Id.* at 739. And most importantly, such error is never harmless:

> The very framework within which the trial proceeded on the kidnapping charge prevented the defendant from presenting his theory of the defense and prevented the jury from determining whether all the elements of kidnapping for robbery had been proved beyond a reasonable doubt. We conclude that Conde was deprived of a fair trial on the kidnapping charge.

Id. at 741; *see also United States v. Monger*, 185 F.3d 574, 578 (6th Cir. 1999) ("[T]he district court's failure to instruct the jury on the lesser included offense of simple possession was an intrinsically harmful structural error which requires us to reverse."); *United States v. Mack*, 362 F.3d 597, 603 (9th Cir. 2004) ("Deprivation of counsel is a structural error. By extension, so is deprivation of the right to present closing argument." (citations omitted)).

Our constitution guarantees certain basic and fundamental protections to all criminal defendants, no matter how overwhelming the evidence may be. The right to present a full and proper defense is one of those guarantees.

I dissent.

s/ Sanders, J.

s/ Alexander, C. J.

s/ C. Johnson, J.

s/ Madsen, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	NO. 03-1-01034-7-I
	)	COA NO. 53767-9-I
JOSHUA FROST,	)	
	)	
Defendant.	)	

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE CATHERINE SHAFFER, JUDGE
KING COUNTY SUPERIOR COURT
KENT, WASHINGTON

DECEMBER 3, 2003

APPEARANCES:

FOR THE PLAINTIFF: ZACHARY C. WAGNILD
DEPUTY PROSECUTING ATTORNEY

FOR THE DEFENDANT: JERRY STIMMEL
ATTORNEY AT LAW

VICTORIA RACCAGNO
OFFICIAL COURT REPORTER

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THE COURT: Thank you, Mr. Wagnild.

Ladies and gentlemen, please give your attention now to Mr. Stimmel for opening statement on behalf Mr. Frost.

MR. STIMMEL: Thank you, your Honor. You will find much to fault Mr. Frost with. But you will also find that, despite what is charged and what is outlined by the state's attorney, he is not guilty of everything he is charged with.

For some of you who were in before, we talked about he might be guilty of some things but not all. And what you will see is that he is guilty of some of the things he is charged with but not all.

It was Joshua Frost's great misfortune a couple of

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years ago to become acquainted with Matt Williams. Matt Williams, you may recall, or you will soon see is one of the other guys involved in this case. Matt Williams used to live in the same apartment complex that Joshua Frost did. And they didn't have a particularly close relationship until earlier this year. Matt Williams encountered Joshua Frost a few days before all this happened. Matt Williams was eager for money.

You will find from the evidence that Mr. Frost heard from Matt Williams, Williams was being humiliated and felt he needed to do something to improve his financial situation in order to save himself from the humiliation. Though that doesn't matter for this case, what does matter is that Matt

Williams isn't just a guy named Matthew Williams, he has a street name. His street name is Fatal. His street name Fatal he goes by because it is deserved. His street name Fatal is cemented into his personality because he wears a tattoo with that name. He is proud of the name, he is proud of the reputation he has for it.

You will learn that from the perspective of anyone around him, including Joshua Frost, Fatal, Matt Williams, is a dangerous man.

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Now Fatal happened to know just enough about Joshua Frost to know that Joshua Frost cared a lot about his her mother, who is disabled, and his brother Timothy, who has Down's syndrome. And even though Timothy had a group home where he could go, Joshua Frost was mainly his care giver. In fact, Joshua Frost was a group home employee and hoped to run his own group home one day. Matt Williams and Fatal knew that Joshua Frost's Achilles heel, his vulnerable point was Joshua's vulnerable mother and vulnerable brother. You will learn that Matt Williams, Fatal, threatened both Joshua and Alex Shelton, the other guy you heard about, threatened them both that they had to help him acquire this money by robbing people or else suffer disastrous consequences to themselves or their families. You will learn that when they went -- and that was why Joshua Frost went along with this.

It wasn't an agreement. He went along at first under the threat of Fatal. As I say, you will find fault with Joshua Frost for this, but it is not as it has been laid out by the state. He went, that is Mr. Frost went with Fatal and Alex Shelton, the other guy, to the Gapp residence. There they perpetrated this

robbery, which Joshuwa wouldn't have done except for the threats by Fatal. But we are going to have to

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concede that he was there and he did it.

What he didn't do, though, was he didn't have anything to do with any of the guns in any of these robberies, and he didn't have anything to do with the assault against Verna and Lloyd Gapp. He was there. He did the robbery. You will find plenty of fault with him for that. But he did not participate in the assault, he did not have a gun, he didn't have a control over the gun.

You will learn that Fatal had the gun in the Gapp home. You will learn that Fatal had bullets in the gun in the Gapp home. You will learn that Fatal had the gun and the bullets because he was in control of the situation and had anything, had his compatriots, Alex and Joshua, not gone along with this, either they or their families would have been harmed. You may not find that an excuse in this case for the robbery of the Gapps. But I think you will find from the evidence that Mr. Frost didn't have anything to do with the guns.

Now in the succeeding store incidents, the store robberies, Mr. Frost didn't actually perpetrate those robberies. You will learn that he was along for the ride only because of the threats by Fatal. You will learn that Fatal always had the gun, Fatal never let

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Joshua or his girlfriend or Alex out of his control.

You will learn that Joshua's girlfriend, Roxie, Roxanne Morel, had her own place, but she often stayed with Joshua in his apartment. You will learn that after Fatal came into Joshua's life a few days before this happened, all of a sudden whenever Joshua and Roxie, Roxanne, wanted to go some place, or if Joshua or Timothy wanted to go some place, or if Josh wanted to visit his mother or something, Fatal was always there. He was everywhere. He was always present. He wouldn't let him out of his sight.

Now I suppose you will find from the evidence that Joshua had some moments when Fatal wasn't there, but Fatal was always a threat to Joshua or his family. You will learn that even though Joshua was present for these store robberies, that he was there only because Matthew, Fatal, had told him to be there, upon the pain or death or serious injury to his own family. Once again, you will find plenty of fault with Joshua Frost, but you will find pros, but you will find he didn't have anything to do with the guns, any control over the guns, and he wouldn't have done any of this except for the force from Fatal.

Now I won't be able to tell you what the perspective was from Matt, Williams, Fatal, or from

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Alex Shelton, the other guy, because I don't know and technically I don't care. All I can tell you is what the evidence will show you about Joshua Frost.

You have heard from the state's opening that there was another guy involved, too, a guy named Jason, but his role in this was apparently somewhat a side show. Nevertheless, it was Matt Williams,

Fatal, who put his thumb on Joshua Frost and only because of that do we find ourselves here.

You will find from the evidence at the end of the this that Joshua Frost is guilty of the robbery of Verna and Lloyd Gapp, I suppose you will find that. You will find that he is not guilty of the others and you will find he is not guilty in any event of any of the gun charges. And at the end of this I will be asking you for your verdict of not guilty of the gun charges and not guilty of most of the robberies.

Thank you.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, Vs. JOSHUA FROST, Defendant.	NO. 03-1-01034-7-KNT COA NO. 53767-9-I

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE CATHERINE SHAFFER, JUDGE
KING COUNTY SUPERIOR COURT
KENT, WASHINGTON

DECEMBER 9, 2003

APPEARANCES:

FOR THE PLAINTIFF: ZACHARY C. WAGNILD
DEPUTY PROSECUTING ATTORNEY

FOR THE DEFENDANT: JERRY STIMMEL
ATTORNEY AT LAW

VICTORIA RACCAGNO
OFFICIAL COURT REPORTER

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THE COURT: Instruction 11 is duress is a defense. Let me pause here. I presented State v. Riker yesterday, and because Mr. Stimmel was working in our

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court, which we have always permitted him to do when court is not in session, I had Ms. Roberts share my copy with him. I know the state is already aware of Riker because we talked yesterday about reviewing it. Riker clearly says that duress is a defense which requires the defendant to admit the elements of the crime before it can be raised. Mr. Frost did that in this case and alleged duress as to every incident that is charged here, with the exception of the assault in the second degree charge for which I don't recall him admitting any responsibility or connection. And it seems to me that, therefore, this instruction is appropriate with regard to all charges here with the exception of the assault in the second degree charge. Any exception by the state to the duress instruction?

MR. WAGNILD: No. Are we planning on pointing that out to the jury in some way what it applies to.

THE COURT: I am going to point out which definition here applies specifically and I will let the attorneys argue on this issue although I expect you both to correctly state the law.

Any exception from the defense?

MR. STIMMEL: No. But is the court telling me I have to explain to the jury that we admit all the elements of the all the offenses charged?

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THE COURT: No, I am saying to the extent you argue they apply the duress instruction you need to be careful that they not apply it to the assault in the second degree charges. Are you following me as to the assault in the second degree charges? He didn't do it and if he did he was under duress.

MR. STIMMEL: No objection as to 11.

THE COURT: You can clarify, Mr. Wagnild, how the duress defense works here and why and be careful that you don't tread on Mr. Stimmel's ability.

MR. WAGNILD: I won't do that. My concern is we are going to see him get up in closing and argue, first of all, we haven't proved accomplice liability for any of them and then saying duress.

THE COURT: If he says that the duress instruction will come out of the case.

MR. STIMMEL: Excuse me, your Honor?

THE COURT: You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. Riker is very clear on this. You must admit the elements of the offense have been proved before you can use the duress offense. Fortunately for you, your client just got on the stand and admitted everything except the assault in the second degree charge. He

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admitted he knew about it, he participated in every one of these events and he at least assisted by being

the get away driver except for the assault in the second degree charge. I can't believe you would disregard your client's testimony.

MR. STIMMEL: But am I not permitted to argue in the alternative, using duress and failure to prove in the alternative?

THE COURT: No. Duress is an affirmative defense. To quote Riker, a defense of duress admits that the defendant committed the unlawful act but pleas an excuse for doing so. You may not argue both. Riker wouldn't stand up if that was the ability the defense has. Once the state proves its charges the defense says it is proved and that is when you get an opportunity to raise this affirmative defense and prove it by a preponderance. I don't see any other way to write it. There are pages and pages about this.

MR. STIMMEL: May I make a brief record?

THE COURT: Sure.

MR. STIMMEL: The record is this. I have read Riker and it did not seem to me that Riker stands for the proposition that every element of the charge, it may stand for the proposition that some elements of

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the charge may have to be admitted but it did not stand, to my way of seeing it, for the proposition that you couldn't still argue in the alternative for whatever may be available in the record that is before the court.

THE COURT: All right, I want you to take a look at the Riker case.

MR. STIMMEL: I have a copy.

THE COURT: Look at page 367 -- actually look at page 368. The end of 367 on to 368, Riker says a defense of duress admits, emphasis on admits in the original, that the defendant committed the unlawful act but pleads an excuse for doing so. There is no element that is negated. Keep going, further down after further citations the court says successful duress defense does not create a reasonable doubt that the defendant did the crime charged but rather condones the defendant's admittedly unlawful conduct, and then finally the court says at the end of the next sentence a duress defense necessarily allows for no doubt that the defendant did the acts charged.

Now, Mr. Stimmel, I don't think I can say anything but the court is unambiguous in saying you have got to admit the defense to use the defense and I will let you do that here but don't try to do both.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff,	
Vs.	NO. 03-1-01034-7-KNT
JOSHUA FROST, Defendant.	COA NO. 53767-9-I

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE CATHERINE SHAFFER, JUDGE
KING COUNTY SUPERIOR COURT
KENT, WASHINGTON

DECEMBER 11, 2003

APPEARANCES:

FOR THE PLAINTIFF: ZACH WAGNILD
DEPUTY PROSECUTING ATTORNEY

FOR THE DEFENDANT: JERRY STIMMEL
ATTORNEY AT LAW

VICTORIA RACCAGNO
OFFICIAL COURT REPORTER

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MR. STIMMEL: Thank you very much, your Honor.

It is possible for an accomplice to be an unwilling accomplice and still be criminally liable. That is possible to do. You don't have to be a willing participant, you can be an unwilling participant. But if you are trapped into it by genuine fear then you are not criminally liable. Now that is the are as to did you are that is the duress. Mr. Frost was trapped into this and it is not pretty but it is a fact.

You will recall from the testimony that Fatal, Matt Williamsas, the head guy, the boss, the lead man, and he was the gangster, he was the guy with unsavory friends or family or whoever it was that he bragged about. He is the guy, Fatal, is the guy who was the dangerous one. It is because of Fatal that Joshua Frost was trapped. That is the duress that applies.

Now we know, I know, that duress will not, will not get Mr. Frost over the robbery in the Lloyd and Verna Gapp house. We are. From Lloyd and Verna

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Gapp's perspective it didn't matter who was under duress, it didn't matter who was trapped, and even if you thought that Joshua was trapped in the situation I am pretty sure you are not going to let Verna and Lloyd have to wonder what went wrong in the trial that no one was held accountable and we are prepared for being held accountable in the Verna and Lloyd Gapp property because it is just too

painful, just too painful. Even though Joshua Frost was, nevertheless, trapped in the situation, we concede that since he went in the house with the others we are pretty sure you will find him guilty. What about the others? He didn't go into any of the other stores. He did drive but he was trapped into doing something, trapped by his friend. Remember, Fatal was the guy at the 7/Eleven who jumped over the counter. You can see that in the photos here. Mr. Nyjar, the 7/Eleven franchise guy, said that it was Fatal, the black guy, who we now know is Fatal, he was the guy who did all the talking and was the leader. And we know that even at the very end when they were all together in this building for the arraignment hearing Fatal tried to make good, at least tried to sound like he was making good, he sure sounded sincere on his threat to kill Joshua or his mom or his brother. And that happened

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here. And we know that happened not just because Joshua said so but because some guy who was just a bystander, had nothing to do with either of them, heard it and was willing to put it down on paper, and it is an exhibit that you can read if you want to in the jury room.

You are probably well aware that the thrust of what we are trying to produce here is to divorce ourselves, that is Joshua, from these guns. He wasn't a gun owner, wasn't a gun fancier, had nothing to do with the guns, wasn't allowed to have anything to do with the guns. He did have a chance to handle the two guns that were in his stereo or on top of the stereo, he did have a chance to do that but that was the only time he handled the guns. Joshua Frost had nothing to do with the guns, and from that

we say that Joshua Frost had nothing to do with the activities pertaining to the guns.

Now you will see or have seen in the back of your jury instruction packets there are two sets of verdicts. There is a verdict form with a bunch of verdicts for each count, and there is a special verdict form. Mr. Wagnild referred to it as the enhancement, the firearm enhancement. And for these what counts here is that Mr. Frost really was trapped.

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He was trapped by the fear of Fatal because the things that Fatal was known for and the things that Fatal was actually doing had to do with the handling of the guns. Joshua Frost didn't do any of the handling of the guns. Yes, he drove and that is painful enough. But he had nothing to do with what was going to be done with the guns or not to be done with the guns, and he was divorced, he was removed from whatever was happening with the guns. You will see when you review these instructions that in a first degree robbery it is a first degree robbery if somebody goes and displays what appears to be a gun. It doesn't have to be a real gun to be a robbery. In this case it is pretty clear that at least some of them were real guns. Joshua himself believed that, and the two guns that are in evidence are apparently real. It is possible to have robbery in the first degree by displaying what appears to be a firearm, a deadly weapon. It does not follow that if there is such a display of what appears to be a firearm, it does not follow that that leads to a necessary conclusion that Joshua Frost was armed with one, and that is what these special verdicts are asking you to determine.

Did Joshua Frost have -- was he armed with a gun? Now from the evidence in front of you, you could go

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either way. I hope you won't assess criminal liability against Joshua Frost for this firearm enhancement because regardless of whatever liability and accountability you may think appropriate for them he didn't have the liability and accountability for the guns. The guns were not his deal, he couldn't control them, wasn't allowed to control them, had no control over them and it was Fatal, the mean guy, that exercised the policy decisions and the control of them. Fatal threatened Joshua with harm to his brother and his mother. Fatal knew where his brother and his mother lived. Fatal knew that his mother still lived in the same apartment complex where Josh first encountered Fatal back in the old days before Joshia moved to his rental house where all this took place.

Once again, you can have an unwilling accomplice. You can be reluctant. A reluctant player can still be criminally liable. But if he is trapped by a threat, he is not. I am sure you will not find that sufficient to exonerate Mr. Frost for the Lloyd and Verna Gapp robbery. We are prepared for that. But on the extra step the prosecution is trying to ask for, that is the special firearm enhancement, the special verdicts, he is not guilty of those.

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Now a couple of other things he is not guilty of. Remember these assaults, the most serious assault here, and these are all charged as assault in the second degree, the most serious assault in the second degree here was at Ronnie's Market. This

was the 17th of April and somebody there got shot in the hand. That is assault in the second degree if it was done by a firearm or a deadly weapon, and apparently it was. Assault in the second degree was inflicted by the firearm and the firearm was not in Joshua Frost's area. You may find Joshua Frost guilty of a robbery of the Ronnie's Market by virtue of his driving. He is still trapped in the threat, but even if you do that, the extra special allegation that the state is trying to get you to sign doesn't apply to Joshua Frost.

The other assault in the second degree is of Kurt Sears. Remember he is the guy who said, you know, I really wasn't threatened myself. He pulled up to the 7/Eleven with his friend Annette Palu and out came Alex, pointed a gun at both of them, Kurt Sears said I really knew he wasn't going to do anything to me. In order for it to be an assault it has to have inspired some fear or apprehension of harm, and for Kurt Sears it did not. So no matter how you would come out on

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the liability of an accomplice on the 7/Eleven matter Kurt Sears was not assaulted. And so not only is Joshua Frost innocent of that charge but everybody else is too if Kurt Sears wasn't actually made apprehensive of harm, and he wasn't.

Now his friend Annette Palu was, at least she said she was. And we don't have any reason to doubt that. She probably was more agitated about it than Kurt Sears was, her friend. She said she was. She had never had a gun pointed at her before and she was a bit more apprehensive of being hurt. And so you could find that somebody in that group may have committed an assault against Annette, not against

Kurt Sears but, in any event, it was not Joshua Frost who was armed with a firearm. And you can tell, I really want you to think carefully about that firearm and exonerate him from that because that is the one thing in this eleven-day span of misery that he didn't have anything to do with.

When we opened this trial we told you that you will find much to fault Mr. Frost for. But the firearms shouldn't be one of them because he couldn't have any control, he couldn't, because he was trapped into this situation. Now I don't know if the state is trying to allege that Joshua actually went into the

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store, into any of these stores. Eddy Shaw, not our favorite witness, Eddy Shaw came in and he said he was sure that Joshua Frost was in the store. He couldn't have been. It was not Joshua Frost in the store but the state has produced a little evidence suggesting that maybe it was. But I hope you are satisfied that Joshua Frost didn't go into any of the stores. Remember that even Eddy Shaw, our least favorite witness said that Alex had about the same build and weight as Joshua. It was Alex who had the glasses. It was Alex who had the acne, and it was Alex who was in the store. One of the witnesses, and I think it was Andrea Rangel at the Taco Time, she said that there was a black male in there, and you know that was Fatal, and a white male, and the white male had acne. That was Alex. That was not Joshua. The white male wore glasses. Joshua does not wear glasses.

Now Joshua made some effort kind of late in the game and a little bit on the lame side, I agree, to get out of this. He called his Aunt Judy Easter

morning and said, tried to make sure she was going to be home because he wanted to bring his mom and his brother down. Well, I think you will agree that probably came a little too late. And we are not saying that that was a particularly successful effort

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to get out of this trap. But it does show that he did feel that he was in it and he didn't know how to get out of it. In a space of eleven days in a lifetime some people have the judgment and the ability and the moxie to get out of a situation in different ways from others. Joshua couldn't find a way out of this in the eleven days allotted. You will probably wonder why that is. You will probably find a way to believe he should have been able to find a way. And maybe you will think that. But whatever it is, he didn't have anything to do with the guns and from his perspective he really was trapped by the threats of Fatal.

Please take a look at the jury packet that you have got. On the third page of instruction one the judge read to you the middle paragraph there that says you have nothing whatever to do with any punishment that may be imposed in case of a violation of law, you have nothing whatever to do with punishment. The fact that punishment may follow conviction can not be considered by you except insofar as it may tend to make you careful. You must be very, very careful.

The next paragraph says you are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. The proper verdict. The proper verdict requires you

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to undergo a bit of a painful exercise here. I think the natural instinct of all of you probably at the outset was why are we even here. You are probably angry. And so you are going to be asked to do a lot of parsing of the actual facts, the actual exhibits and the actual conduct. And that parsing is going to be a matter of your duty as jurors and not as somebody reading a newspaper and judging from a top of the head reaction. And when you parse these out you will see that Joshua is liable probably for the -- even though he was trapped, I could plausibly claim, I could legitimately claim even for the Gapp robbery. I know you won't buy that. But what is he liable for? You could find him liable for the T and A Video robbery because he did go into the store a little bit before the guys with the guns went in. He went into the store and you could find that for the cases in which Joshua actually went in some place and with the T and A Video he didn't go in to rob, he went in to look around because Fatal told him to do that. You could say that is a bit too much and I wouldn't blame you for that if you did, but still he was not armed with a firearm.

Take a look at instruction number 8, please. A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the

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scene or not. A person is an accomplice in the commission of a crime if with knowledge that it will promote or facilitate the commission of the crime he either solicits, commands, encourages or requests another person to commit the crime or aids or agrees to aid another in planning or committing a crime. An unwilling participant in these things can still be an accomplice and can still be -- but if he is trapped by threats he is not liable.

Take a look please at number 11. Duress is a defense. If he thought that he would be liable to immediate death or immediate grievous bodily injury and it was reasonable for him to think that and that he would not have participated had it not be so, those are the three things, and we have to prove that. It is a uncomfortable situation in a criminal case for the defense to have to prove innocence, because normally, as you know, the defense does not have to do that.

You know from Joshua's confessions to the police that nothing like this has ever happened to him before. You know that this is just a very small window of time in his life, 11 days, less than 11, really. This ended for him on the 17th of April, it started on the 9th, ended on the 17th. And you will

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fault him, I am sure, for not taking some extra action, having done something else, but from his perspective 11 days of time is for some people what is needed in order to get out of a situation.

We all have something we wish we had done differently in life, we all have situations in which we wish we had handled something differently, and you know that Josh Frost is wishing that now. The question is from his perspective under the threats of bodily harm to either him or his mom or his brother, is that window of time -- did he take too long? You might find that. I hope you don't. But you might find it. I think you can find Joshua Frost guilty of the Gapp robbery because that is just so overpowering, and he did go into the house. I think you can find Joshua Frost guilty of the T and A robbery not because he went in to do the robbery but because he actually entered the store. And the only

reason I think you could find him guilty of that is that it is kind of just too much to ask for somebody who is willing to take the step to let him off.

And I know that is what you are thinking, some of you. But as to the cases in which he didn't go in anywhere and was just told to stay put, we are asking you to find him not guilty, and even if you find him

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guilty he is not guilty of the guns. You can find him guilty of displaying the gun as an accomplice, I suppose, which is one of the things you have to find to make a robbery in the first degree. But that doesn't require you to find the special verdict firearm allegation in addition. You don't have to do that. And we hope you don't. And we think that the basis for not doing that is that the guns were out of his control.

Now recall that the 7/Eleven and the Ronnie's Market both occurred on April 17th. They both occurred without any pre-planning on Josh's part. It may be Fatal who had some notion he was going to do this. That was the day Fatal wanted Josh to drive him out to a cousin's in West Seattle some place. And they did that. They went and Fatal smoked something that we don't know the exact nature of but it was some kind of, you can infer by the circumstantial evidence of it that it was some illicit drug. We don't know. It doesn't matter whether he did, actually. But whatever he did he came back and all of a sudden Josh was driving by, Fatal says stop here, I am not going home without money. Now Fatal has a gun on him, he has always got this gun. This was, this 7/Eleven on the 17th of April was not planned, it was a spur of

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the moment thing, and in that situation the entrapment, that is the trap that Josh was in was even more intense because he didn't have time to think about it. It is not a pleasant excuse for participating even as the driver in a robbery. But it really is different from the others where they had time to think about it. And so the 7/Eleven is really in a different category. He didn't have time to get out of that one even if he had time to get out of some of the others. And right away, right after the 7/Eleven, right after, Joshua was driving home and Fatal told him, unt-ah, stop here at Ronnie's, it was in the same general area. That also was a spur of the moment thing, no time for Joshua to plan, nothing for oh, no way out of it. That is also extra painful to somebody that got hurt in that robbery, but at least it wasn't Josh Frost that had a gun. It is still unclear to me, it may be clear to you, what inspired that gun to go off. Fatal apparently wanted to shoot. We don't know, but it wasn't Joshua.

So I have to sit down and when I do I can't stand up again because Mr. Wagnild has to prove this thing. And I would like, nevertheless, to leave you with these verdict forms at the tail end of the jury packet. The first is the regular verdict form and it

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has got a line for to you write guilty or not guilty for each of the counts. Remember count V is missing, it doesn't apply. I think you could not be faulted, frankly, for writing guilty of count I, that is the Verna and Lloyd Gapp home robbery. As to count II, that is also Verna and Lloyd Gapp but this time it is called a burglary. The conduct is the same. The acts

are the same. The event is the same, the participants are the same, the victims are the same and the place is the same. In one place the state has charged it as a robbery, and in another place in count II the state has charged it as a burglary.

You don't have to find Mr. Frost guilty of anything. But if you want to I think you probably can find him guilty of the robbery of the Gapp residence, but the burglary as well? Is that the true nature of this? I think not. From this evidence you could find him guilty of both. But why would you do so? Especially when you know that he was trapped in this web or this voice of fear. You may wish that he had gotten out of it in a better way and he should have. But he is not criminally liable if he was genuinely fearful.

Okay, count III is the Taco Time. Joseph Summerman is the guy who came in and talked about it.

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Also related to that is Andrea Rangel in count XI. So count III and XI are related. Those are the Taco Time counts. Once again, this is one where Joshua tried to talk Fatal out of it. Don't go there. You are not going to get any money and Joshua was actually thinking about when is his girlfriend going to be there. He didn't want that done, but Fatal forced him into it anyway. And for that case, since Joshua didn't go into the store and tried to talk him out of it, tried to talk Fatal out of it, I ask for your verdict on this count to be not guilty. There is no reason to find him guilty on this count. This is the Taco Time, count III, and related to that is count XI, which is the attempted robbery of the other lady in the store, Andrea Rangel.

Count IV is the Ronnie's Market robbery. Related to count IV is count X. Count 10 is assault in the second degree of whatever the name of the clerk is, and it has been unclear throughout this trial exactly who the clerk was but it doesn't matter for most purposes. I think you will find that it doesn't matter. Somebody got hurt in that robbery, hurt by a gunshot in the hand by Fatal. Just because of the serious nature of it you may want to find Joshua guilt of the robbery just because it is so serious,

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but he was still trapped in that and didn't have time to fix it. The Ronnie's Market and the 7/Eleven came on him so fast he didn't have time. I am asking for your verdict on the Ronnie's Market and the 7/Eleven counts of not guilty. And those are count IV. Count VI, and count VII, which is Kurt Sears where he wasn't scared of anything, count VIII, that is Annette Palu, who had the gun pointed at her but it wasn't Joshua Frost doing the gun, and count IX, this is the man in the 7/Eleven who did not testify yet. Randhawa is his last name. So for those counts I ask for your verdict of not guilty. I know be are taking a risk that you may find Joshua Frost guilty nonetheless, but if you do, he is not guilty of the special firearm.

As to count XII, the T and A Video, Joshua went into the store. He didn't do the robbery. He did a little bit more there and could have had perhaps more of a chance as a fixer. And I couldn't really fault you for wanting to find him guilty of that. He is not really guilty if he is in the same trap as all the others, but I can understand and it is natural you will want to hold somebody accountable for this. You already know that Alex has been held accountable for something.

You will want to hold Joshua accountable and we

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know that you are not going to just set him free. It is just too serious, especially with the Gapps. But what you shouldn't do is make unnecessary findings of guilt on the special verdict. For those he is not guilty. He couldn't have had any control over the guns.

So if you turn to the special verdict forms, and that is the last two pages in your packet, you could find from the evidence before you if you didn't want to believe Joshua, and if you saw no hope, you could find yes in all of those special verdicts on all of these three pages in the back. You could do that. But in a case where doubt should be resolved in favor of the defendant, you should find no. And I hope that is what you do. For the special verdict forms I hope it is no on all of these special verdicts.

On the regular verdicts I am prepared to see, and I think I will see a more mixed result. I am prepared to see, and I think you will find that Joshua was involved in so much that you are just not going to find it satisfying that he was trapped in a threatening situation, it is not satisfying enough to let him off for the Gapp robbery. I think you will probably find him guilty there. But not on the 7/Eleven, not on the Ronnie's Market, and not on the

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assault. He had nothing to do with assaulting anyone and as to Kurt Sears nobody assaulted him. I hope those will be the verdicts you reach. And you will have to struggle with it, I know, because it is a painful case. But the particular focus I believe is the

special verdicts, not armed with a firearm. Joshua Frost asks you -- it asks you was Joshua Frost armed with a firearm. The answer should be no on all of those. Thanks.

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No. 14-95

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK GLEBE, Superintendent,
Stafford Creek Corrections Center,
Petitioner,

- v. -

JOSHUA JAMES FROST,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent Joshua James Frost, through counsel, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari in forma pauperis. Respondent was represented on appeal by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted

September 29, 2014

By_____
ERIK B. LEVIN

Counsel for Respondent

No. 14-95

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK GLEBE, Superintendent,
Stafford Creek Corrections Center,
Petitioner,

- v. -

JOSHUA JAMES FROST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. The Sixth Amendment Right to Present Proper Argument in Summation

In *Herring v. New York*, this Court recognized the Sixth Amendment "'right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and applicable law in his favor[.]'" 422 U.S. 853, 860 (1975) (quoting *Yopp v. State*, 178 A.2d 879, 881 (Md. 1962)). This Court struck down a New York statute empowering judges to deny summation in bench trials because the statute violated the Sixth Amendment by unreasonably restricting defense counsel's vital role in the adversarial factfinding process.

Herring recognized the fundamental right to present proper argument in summation, and did not limit this legal principle to bench trials or to the complete denial of any summation. *Id.* at 858-61. *Herring* made clear that the Sixth Amendment left the trial judge "'no discretion'" to deny the accused the right to make a proper argument, *id.* at 860 (quoting *Yopp*, 178 A.2d at 881), while acknowledging that a trial judge retained latitude to limit summation to a reasonable time and ensure that summation did not "stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." *Id.* at 862.

Herring identified the "right to be heard in summation of the evidence

from the point of view most favorable" to the defendant as vital to the framework of the adversarial criminal trial. *Id.* at 864. "In a criminal trial . . . no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* at 862.

The right to present proper argument in summation is essential to due process because "closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id.* (citing *In re Winship*, 397 U.S. 358 (1970)). Due process requires the prosecution to prove all elements of the crime beyond a reasonable doubt, *see Winship*, 397 U.S. at 361, and guarantees the defendant "the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

Herring found denying a proper argument was *per se* reversible error because "[t]here is no way to know whether . . . appropriate arguments in summation might have affected the ultimate judgment in this case." *Id.* at 864. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n.4 (2006) ("[H]ere, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.") (citations omitted). Accordingly,

this Court consistently treats *Herring* violations as structural error. *See Bell v. Cone*, 535 U.S. 685, 696 (2002); *United States v. Cronic*, 466 U.S. 648, 659, & n.25 (1984).

II. The Trial Court Barred Mr. Frost From Challenging the Sufficiency of the Evidence in Summation

Mr. Frost was charged with participating in five armed robberies. The prosecutor's theory turned entirely on Mr. Frost being an accessory to the charged offenses. *State v. Frost*, 161 P.3d 361, 368 (Wash. 2007) (*"Frost I"*); Respondent's Appendix ("Resp. App.") 4a, 6a-7a. Mr. Frost was not alleged to have carried a firearm in any of the instances; he acted primarily as a driver, and remained in the car during four of the five robberies. *Frost I*, 161 P.3d at 364.[1] His defense was that there was insufficient evidence to prove he participated in his accomplices' criminal acts with adequate knowledge of promotion or facilitation, and to the extent that he was involved, he was under duress. *Id.* at 364. The Washington Supreme Court noted the evidentiary basis for Mr. Frost's reasonable doubt argument was "best illustrated by the

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[1] The State erroneously suggests that Mr. Frost was armed and a principal during the second robbery. *See* Pet. at 4 ("They next robbed a fast-food restaurant armed with guns.") (citing *Frost I*, 161 P.3d at 364). The Washington Supreme Court correctly reported that Mr. Frost "acted as the driver" for that offense and there was no evidence he was armed. *Frost I*, 161 P.3d at 364. This was the prosecution's theory at trial. *See* Resp. App. 6a-7a.

robberies in which Frost was only a driver and remained in the car." *Id.* at 368-9.

Prior to summation, the prosecution moved to preclude Mr. Frost's reasonable doubt argument: "My concern is we are going to see him get up in closing and argue, first of all, we haven't proved accomplice liability for any of them and then saying duress." Pet. App. 146a.

The trial court ordered Mr. Frost to concede guilt to preserve his duress defense: "You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other . . . . You must admit the elements of the offense have been proved before you can use the duress offense[.]" Pet. App. 146a. Accordingly, Mr. Frost's counsel conceded guilt during summation. *See* Pet. App. 150a-151a, 153a-154a, 157a, 161a-162a.

The prosecution capitalized on these concessions, arguing that "noticeably absent" from the defense summation was any discussion of the relevant law. "There is a reason for that[,]" the prosecution told the jury, "[b]ecause if [defense counsel] had pointed you to the law and pointed to the elements of the offenses and he pointed to the firearm instruction and made his argument you would realize that his argument is phoney [sic], his arguments don't match up with what the law is and that is really what we are

here for." Resp. App. 3a.

The jury convicted Mr. Frost, and because the individuals he was alleged to have assisted carried firearms during the offenses, Mr. Frost was sentenced to nearly 55 years in prison, 44 years of which were mandatory firearm enhancements.

III. Washington State Proceedings

On direct appeal, the Washington Supreme Court unanimously concluded that the trial court erred in precluding Mr. Frost's legally-available and factually-supported reasonable doubt argument. The trial court error violated the "Sixth Amendment right to have counsel make argument to the jury," *Frost I*, 161 P.3d at 367 (citing *Herring*, 422 U.S. 853); *id.* at 371 (Sanders J., dissenting), and "lessened the State's burden [of proof]," *id.* at 368, a violation of the Fourteenth Amendment "due process requirement that the State prove each element of a charged offense beyond a reasonable doubt." *Id.* at 367 (citing *Winship*, 397 U.S. 358).

The state supreme court found there was a legal and evidentiary basis "for counsel to argue that the State failed to prove Mr. Frost participated in each of his accomplices' criminal acts with adequate knowledge or promotion or facilitation[.]" *Id.* at 368-9. The trial court erred by misinterpreting state

law to require the defendant to concede guilt before presenting a duress defense. *Id.* at 365 ("We hold the trial court erroneously interpreted our decision in [*State v.*] *Riker*[, 869 P.2d 43 (Wash. 1994),] and, based on that erroneous interpretation unduly limited the scope of Frost's counsel's closing argument, thus abusing its discretion."). The Washington Supreme Court held this error was of a constitutional magnitude, and not an exercise of the trial court's "latitude in controlling the duration and limiting the scope of closing summations." *Herring*, 422 U.S. at 862 (quoted in *Frost I*, 161 P.3d at 365). A bare majority of the court, however, ignored *Herring*'s admonition that "[t]here is no way to know whether . . . appropriate arguments in summation might have affected the ultimate judgment[,]" *Herring*, 422 U.S. at 863, and concluded it was "equipped to assess whether the trial court's mistake . . . affected the outcome of this case" and found the error harmless. *Frost I*, 161 P.3d at 370.

IV. Federal Habeas Proceedings

Mr. Frost filed a petition for writ of habeas corpus in federal district court challenging the Washington Supreme Court's decision to apply harmless error as an unreasonable application of *Herring* and *Winship*. The district court denied the writ, but certified the issues for appeal. After a split panel of the

Ninth Circuit affirmed the denial of relief, *Frost v. Van Boening*, 692 F.3d 924 (9th Cir. 2012), Mr. Frost sought *en banc* review.

The Ninth Circuit, sitting *en banc*, agreed with the Washington Supreme Court's conclusion that the trial court had violated *Herring* and *Winship*, but held that it was unreasonable on the unique facts of this case—including the state court finding that the error lowered the prosecution's burden of proof—to conclude these constitutional violations were trial errors subject to harmlessness review. *Frost v. Van Boening*, 757 F.3d 910, 914-15, 917 (9th Cir. 2014) (*"Frost II"*); *see id.* at 917 ("a defendant cannot constitutionally be tried using a lesser burden of proof") (citing *Winship*, 397 U.S. at 364-5).

The Ninth Circuit cited *Herring*'s admonition that no matter how "'open and shut'" the case may seem, "there are 'cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict.' 'And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.'" *Id.* at 916 (quoting *Herring*, 422 U.S. at 863).

The Ninth Circuit then noted that it was "[f]or these reasons we have held that preventing a defendant from arguing a legitimate defense theory constitutes structural error." *Frost II*, 757 F.3d at 916 (citing *United States v.*

Miguel, 338 F.3d 995, 1000-03 (9th Cir. 2003), and *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000)). The court noted that its decisions "do not constitute 'clearly established Federal law' for the purpose of 28 U.S.C. § 2254(d)(1)[.]" *Id.* at 916, n.1.

REASONS FOR DENYING THE WRIT

This case is unworthy of *certiorari* for four reasons. First, this case is unlikely to provide any definitive guidance on when less-than-complete denials of the right to present summation are subject to harmless error because of the restricted habeas corpus inquiry. Second, the State cannot identify any circuit conflict on when less-than-complete denials of summation are subject to harmless error. Third, this case presents no important issue of federal law because it is well-settled that courts may not base their conclusion that federal law is clearly established on circuit precedent, and the Ninth Circuit followed this proscription. Finally, the petition, at root, seeks error correction, which is not a basis for granting *certiorari*, particularly in this case, where the state's argument lacks any merit.

I. This Case Is a Poor Vehicle for Assessing Under What Circumstances Less-Than-Complete Denials of the Right to Present Summation Are Subject to Harmless Error.

The State does not raise in its Question Presented whether and under what circumstances less-than-complete denials of summation are subject to harmless error. Instead, it focuses exclusively on the habeas corpus issue: whether it is "clearly established" that the type of error here is structural. Given the restricted focus of this analysis, it is exceedingly unlikely that this Court would be able to issue a definitive holding that would provide guidance on this issue in the non-habeas context. Nor is it necessary, since the error is rare—as evidenced by the dearth of lower court decisions considering it—and there is a general consensus about how to evaluate its effects.

II. There is No Circuit Split on Whether Less-Than-Complete Denials of Summation Are Subject to Harmless Error.

The precise type of *Herring* error here—precluding defense counsel from arguing insufficient evidence under circumstances where state law allows him to do so—is different and more egregious than the other types of denials at issue in the cases from lower courts that the State cites. Indeed, the State identifies no other case involving exactly this type of *Herring* error—one that by the state court's own admission, lessened the prosecution's burden of proof across the board, not just on one element.

The cases the State cites reaffirm the line *Herring* drew and the Ninth Circuit followed: trial courts have discretion "in controlling the duration and limiting the scope of closing summations[,]" but no authority to deny "closing argument on a legitimate defense theory." *Frost II*, 757 F.3d at 915 (quoting *Herring*, 422 U.S. at 862).

1. *Richardson v. Bowersox*, 188 F.3d 973 (8th Cir. 1999), Pet. at 24, relied on *Herring* to limit summation to arguments that lacked an evidentiary basis. *Id.* at 979-80 (quoting *Herring*, 422 U.S. at 862). *Richardson* concluded that the trial court limitation was proper because misrepresenting facts in summation was prohibited and might confuse the jury. *Id.* at 980 (quoting *United States v. Sawyer*, 443 F.2d 712, 713-14 (D.C. Cir. 1971)). Moreover, the trial court had permitted the defendant "to argue extensively during closing argument that he did not participate in the [homicides,]" *id.* at 980, and therefore, even if it were error to limit summation to facts in evidence, the court concluded there would be no "manifest injustice[.]" *Id. Richardson* is therefore in line with the Ninth Circuit's conclusion that there is no *Herring* error unless the court completely precludes a legitimate defense theory. *See Frost II*, 757 F.3d at 918 (total preclusion of an argument is constitutional error "which *Herring* instructs is structural error. . . . Absent *Herring* error there is no error

at all or trial error subject to a harmlessness inquiry.").

The remaining circuit cases the State cites, Pet. at 24-26, similarly apply harmless error to summation limitations that fall short of complete preemption of a legitimate defense theory and do not lower the state's burden of proof.[2] Harmless error review this context is entirely consistent with the Ninth Circuit opinion below. *See Frost II*, 757 F.3d at 915.

In contrast, the Washington Supreme Court found that precluding Mr. Frost's entire reasonable doubt argument *did* lower the prosecution's burden of proof. *Frost I*, 161 P.3d at 368 ("By preventing counsel from arguing this point [reasonable doubt] in closing, the trial court lessened the State's

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[2] *See United States v. Wilcox*, 487 F.3d 1163, 1173 (8th Cir. 2007) (barring defense summation argument that suppressed forensic evidence did not exist was harmless where the trial court did not preclude defendant from presenting his defense theory); *United States v. Bautista*, 252 F.3d 141, 145 (2d Cir. 2001) (affirming preclusion of portions of the defense closing argument that included "objectionable factual assertions that certain things not offered in evidence do not in fact exist" as an appropriate exercise of discretion and noting the restriction did not "distort and effectively lower the burden of proof") (citing *Herring*, 422 U.S. 853) (internal quotations omitted); *United States v. Blanche*, 149 F.3d 763, 769 (8th Cir. 1998) (affirming trial court order barring summation on portions of the interview videotape not in evidence, and in the alternative, it was harmless error because the defense did refer to the videotape despite the trial court order); *United States v. Poindexter*, 942 F.2d 354, 359-60 (6th Cir. 1991) (trial court barred comments on the absence of a particular type of forensic evidence, but did not bar the defense from arguing insufficient evidence to convict); *United States v. Davis*, 557 F.2d 1239, 1244 (8th Cir. 1977) (even if trial court erred in limiting the scope of summation, it was harmless because the court permitted counsel to argue his theory of defense and "did not instruct the jury to disregard the argument").

burden"). The State has never challenged the Washington Supreme Court's finding below, and in the interests of comity and federalism, it is entitled to deference. *Cf. Williams v. Taylor*, 529 U.S. 420, 436 (2000) (noting "AEDPA's purpose to further the principles of comity, finality, and federalism.").

The State also contends *Frost II* conflicts with a pre-*Herring* case, *United States v. DeLoach*, 504 F.2d 185 (D.C. Cir. 1974), in which the trial court barred defense counsel from arguing in summation what the court considered factual misrepresentations, but otherwise permitted him to challenge the sufficiency of the evidence. The D.C. Circuit reversed under harmless error after concluding the defense was arguing inferences based on evidence, not misstating facts in evidence. *Id.* at 120-22. *Frost II* does not conflict with *DeLoach*, it simply addresses an issue not raised in *DeLoach*—whether completely precluding any challenge to the sufficiency of the evidence (when state law permits such an argument) is structural error under *Herring*.

2. The State's attempts to create a split between the Ninth Circuit's opinion and state courts is equally unavailing. *See* Pet. at 17 (citing *Lemos v. Texas*, 130 S.W.3d 888 (Tex. 2004), and *Nelson v. Indiana*, 792 N.E.2d 588 (Ind. Ct. App. 2003)). In *Lemos v. Texas*, the trial court erroneously precluded the defense from arguing in summation that the defendant's blood alcohol

concentration could have risen during the two-hour period between the car accident and the blood alcohol test, but permitted him to argue "there was no evidence of what it [Lemos's blood alcohol content] had been at the time of the crash." 130 S.W.3d at 890, 892. And in *Nelson v. Indiana*, the trial court erroneously barred defense counsel from challenging the reliability of forensic testing during his summation, but permitted him to argue the "*poorly tested evidence*" was an insufficient basis to convict. 792 N.E.2d at 594 (emphasis in original). Neither *Lemos* nor *Nelson* involve the "absolute preemption of . . . [a] factually supported, legally available defense theor[y]." *Frost II*, 757 F.3d at 918.

3. While the State cannot identify any case that conflicts with the Ninth Circuit opinion, it ignores those that adopt the very same interpretation of *Herring*. In a strikingly similar case, *Herdt v. Wyoming*, 816 P.2d 1299 (Wyo. 1991), the Wyoming Supreme Court held that precluding the defendant from arguing consent in addition to reasonable doubt in a sexual assault trial "deprived appellant of his fundamental right to present closing argument" as set forth in *Herring*, and "[s]uch deprivation is legally presumed to result in prejudice." *Id.* at 1302.

And in *Connecticut v. Arline*, 223 Conn. 52 (1992), the Connecticut

Supreme Court held it was *per se* reversible error to deny the defendant his federal Sixth Amendment right to "full and fair participation" in the trial by depriving him of "any opportunity to argue the motive for bias of the state's chief witness" where it was "the linchpin of the reasonable doubt defense" and precluding it was tantamount to denying the defense altogether. *Id.* at 64. Looking to *Herring*, *Arline* held that "the right to present a closing argument is abridged not only when a defendant is completely denied an opportunity to argue," but also "when a defendant is deprived of the opportunity to raise a significant issue that is reasonably inferable from the facts and evidence . . . . [and] the prohibited argument bears directly on the defendant's theory of the case." *Id.* at 64 (citations omitted). A "per se rule of automatic reversal more properly vindicates the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." *Id.* at 65. (citations omitted).

III. The Ninth Circuit Did Not Rely on Circuit Precedent as Clearly Established Law.

The State does not identify any real issue of habeas corpus law at stake in this case. It does not argue that granting *certiorari* is necessary to resolve any issue concerning what exactly "clearly established" means. Instead, it claims that the Ninth Circuit relied on its own precedent to define clearly

established federal law in violation of this Court's directive in *White v. Woodall*, 134 S.Ct. 1697, 1702, n.2 (2014). This claim is not worthy of *certiorari* because this Court has already settled that circuit law may not form the basis of habeas corpus relief. And more importantly, the State's argument is contrived.

The Ninth Circuit did not rely on its own precedent to refine *Herring's* principle into a rule this Court has not announced, or to assess the merits of Mr. Frost's habeas corpus claim. *Marshall v. Rodgers*, 133 S.Ct. 1446, 1450 (2013) (per curiam) (citation omitted); *Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012). The court even noted that its opinions do not constitute clearly established federal law. *Frost II*, 757 F.3d at 916, n.1.

Instead, the single-sentence citation to two circuit cases applying *Herring* to similar closing-argument restrictions served only as an example of the clarity of *Herring*'s principle, *Frost II*, 757 F.3d at 916 (citing *Miguel*, 338 F.3d at 1000-03, and *Conde*, 198 F.3d at 739), and "merely reflect[ed] what has been 'clearly established'" by this Court's cases. *Matthews*, 132 S.Ct. at 2155.

The Ninth Circuit was explicit on this point. It quoted *Herring* that "[n]o matter how 'open and shut' the prosecution's case may seem, there are 'cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict.'" *Frost II*, 757 F.3d at 916 (quoting *Herring*, 422

U.S. at 863). "And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel." *Herring*, 422 U.S. at 863 (quoted in *Frost II*, 757 F.3d at 916). And referring to *Herring's* legal principle, the *en banc* opinion remarked, "For these reasons, we have held that preventing a defendant from arguing a legitimate defense theory constitutes structural error." *Frost II*, 757 F.3d at 916 (citing *Miguel*, 338 F.3d at 1000-03, and *Conde*, 198 F.3d at 739).

IV. The State Seeks Error Correction, and Its Argument Lacks Merit.

The State requests that the Court grant *certiorari* to correct what it believes to be the Ninth Circuit's erroneous conclusion that the *Herring* error here was structural error. Taken on its own terms, the State's request is for "simple error correction," which is not a reason for this Court to grant *certiorari*. *See Kyles v. Whitley*, 514 U.S. 419, 422, n.1 (1995). The State's request is particularly inappropriate given that it was the Washington Supreme Court that concluded the *Herring* violation lowered the prosecution's burden of proof. *Frost I*, 161 P.3d at 368. Consequently, the intrusion on state prerogatives in this case is far lessened and the core reason for habeas is present—to allow for new trials when previous trials were fundamentally unfair.

Moreover, the State is simply wrong. In light of the long line of this Court's cases, violating the right to present a legitimate argument in summation and lowering the prosecution's burden of proof are structural errors because they strike at the very framework of the adversarial justice system and their effects cannot be measured.

A. The Sixth Amendment Right to Present Proper Argument in Summation Is Clearly Established.

Herring v. New York recognized the right to present proper argument on the evidence and applicable law in summation as one of the most fundamental and enduring of the adversarial trial rights. 422 U.S. at 858-62. Notwithstanding the clarity of *Herring* on this point, the State argues that the right to present legitimate argument in summation is not clearly established because the New York statute at issue in *Herring* foreclosed summation altogether. Pet. at 16. The State believes that *Herring*'s rationale for striking the statute was *dictum* and *Herring* means only that the accused has the right to say *something* in summation. The State has even argued that, under *Herring*, a ten-second summation might be proper, and that *Herring* permits the trial court to compel defense counsel to admit his client's guilt in

summation and to preclude counsel from addressing a count entirely.[3]

1. The State ignores *Herring's* legal principle. *Herring* did not limit its holding to the complete preclusion of summation, as the State suggests, although it did limit it to "final argument or summation" instead of "argument at any other stage" of trial. *Id.* at 863, n.13. Instead, *Herring* recognized the defendant's broader right to be heard in summation "from the point of view most favorable to him." *Id.* at 864. It is *per se* reversible error to deny this right, *Herring* concluded, because it is essential to the framework of our adversarial system of criminal justice, and because "there is no way to know whether . . . appropriate arguments" would have affected the outcome. *Id.* at 864. This reasoning was not *dictum*. It was an indispensable part of *Herring's* rationale, its holding.

Herring left "no doubt that closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial." 422 U.S. at 858. It found "no aspect" of the adversarial process "could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* at 862.

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[3]*Available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006216 at 31:00-32:10 (limiting summation to one count); 35:20-36:20 (10 second summation). 43:50-44:15 (admitting guilt).

"'The Constitutional right of a defendant to be heard through counsel *necessarily* includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem.'" *Id.* at 860 (quoting *Yopp*, 178 A.2d at 881) (emphasis added). "[T]he trial court has *no discretion* to deny the accused such right." *Id.* (emphasis added).

The *Herring* Court took as self-evident that this "basic right of the accused to make his defense[,]" 422 U.S. at 859, and in particular, to argue reasonable doubt to the jury, was central to a fair trial. "[F]or the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id.* at 862 (citing *Winship*, 397 U.S. 358).

Herring concluded that no right was more central to partisan advocacy, the "very premise of our adversary system[,]" than the right to present proper argument to the factfinder. *Id.* at 860, 862. The right to argument dated back to the Sixteenth Century "when notions of compulsory process, confrontation, and counsel were in their infancy[.]" *Id.* at 860. "Whatever other procedural protections may have been lacking, there was no absence of debate on legal and factual issues raised in a criminal case." *Id.*

The twenty-six state court cases *Herring* cited as "universally" recognizing "the right to make a closing summation to the jury[,]" *id.* at 858, n.8, reflect the breadth of the right. These cases consistently held that depriving the defendant a legitimate argument—even where some argument is permitted—violates the fundamental right to make a closing argument in summation. In fact, only four of the twenty-six cases cited by *Herring* involved the complete preclusion of summation. *See id.*[4]

Several of the cases cited by *Herring* concerned the complete preclusion of a legitimate defense theory in summation and held that completely barring a legitimate defense theory is reversible error because denying the right to present a proper defense theory is tantamount to denying the right to present any argument at all.[5] These cases, like *Herring*, recognized that the trial court

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[4] *Hall v. State*, 160 So. 511 (Fla. 1935); *Porter v. State*, 65 S.E. 814 (Ga. Ct. App. 1909); *Stewart v. Commonwealth*, 11 A. 370 (Pa. 1887); *Word v. Commonwealth*, 30 Va. 743 (1827).

[5] *State v. Shedoudy*, 118 P.2d 280, 285 (N.M. 1941) (conviction vacated because trial court barred reasonable doubt argument); *State v. Verry*, 13 P. 838, 840 (Kan. 1887) (trial court improperly limited defense from presenting a legitimate argument to the jury in violation of the defendant's right to "make a full defense" a "substantial and constitutional right, which cannot be taken away."); *Lynch v. State*, 9 Ind. 541, 1857 WL 3659, *1 (1857) (reversing summation limitation, noting "if it would be error to prohibit counsel to argue a case at all, it was error in the Court below to refuse to permit counsel to argue the legal branch of the case").

retained discretion to curtail argument but no discretion to preclude a proper defense theory. *See, e.g.*, *Verry*, 13 P. at 840.

A majority of the cases *Herring* cited involved time limits on summation and held that courts may regulate summation but cannot deny counsel a "reasonable opportunity to make defense for their clients." *Yeldell*, 14 So. at 572.[6]

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[6] *State v. Ballenger*, 24 S.E.2d 175 (S.C. 1943) (one-hour limit infringed on the constitutional right "to be fully heard in his defence [sic] by himself or by his counsel or by both" in a complex case) (citation omitted); *People v. McMullen*, 133 N.E. 328 (Ill. 1921) (thirty-five-minute time limit violated the right to "a reasonable opportunity to discuss before the jury both the facts and the law of the case . . . . Any limitation of the constitutional right which deprives a defendant of an opportunity to have his counsel argue the law and the facts has always been regarded as error requiring a new trial."); *State v. Mayo*, 85 P. 251, 254 (Wash. 1906) (ninety-minute limit reversed because in this complex capital case the limitation "was too restrictive to allow a full and fair discussion of the facts of the case; and hence was a violation of the defendant's constitutional rights."); *State v. Rogoway*, 78 P. 987 (Or. 1904), rehearing, 81 P. 234 (1905) (reversing a one-hour limit because it was "too restrictive to permit full and fair discussion of the case" and because the Oregon constitution, like the Sixth Amendment to the U.S. Constitution means "that the accused shall have the right to be fully and fairly heard, or else it means nothing."); *State v. Tighe*, 71 P. 3 (Mont. 1903); *Yeldell v. State*, 14 So. 570, 572 (Ala. 1894) (noting that judges must be careful "to allow full and fair opportunity to counsel to present his client's defense."); *People v. Green*, 34 P. 231 (Cal. 1893) (one-hour time limit reversed because "it was impossible, fully and properly, to argue the case to the jury for the defendant within one hour" and "a defendant being tried on a charge of felony has a constitutional right to be fully heard in his defense by counsel, which it is not within the discretionary power of the court to deny or abridge"); *Wingo v. State*, 62 Miss. 311, 1884 WL 3462, *3 (1884) (reversed one-hour summation limit because it abridged the defendant's "right to the time necessary for making his defense fully and fairly"); *State v. Hoyt*, 47 Conn. 518, 1880 WL 2281, *13 (1880) (affirming four-hour time limit because "there is no claim . . . that the time so allowed was insufficient for the purposes of a full, fair and complete defense."); *Williams v. State*, 60 Ga. 367, 1878

Like the cases it cited, *Herring* also recognized that courts may place limitations on a closing argument, such as by requiring that it "not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." 422 U.S. at 862. But nothing in *Herring* suggests that a trial judge may foreclose a legitimate legal argument. Rather, even in a case that appears "to be simple – open and shut – at the close of the evidence," "there is no certain way for a trial judge to identify accurately" whether "closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict" "until the judge has heard the closing summation of counsel." *Id.* at 863.

2. The State essentially argues that law is "clearly established" under 28 U.S.C. § 2254(d)(1) only in contexts factually identical to this Court's cases. This argument conflicts with how the Court determines clearly established federal law.

This Court has instructed that "'clearly established Federal law'" for

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WL 2652 (1878); *Weaver v. State*, 24 Ohio St. 584 (1874) (reversing five-hour time limit noting "To allow insufficient time for argument is, practically and in principle, equivalent to a denial of the right to argue the cause. To the full extent that the cause was not argued for the want of time, the defendant was deprived of his defense, and stands convicted without the aid of counsel.") (citations omitted); *State v. Page*, 21 Mo. 257, 1855 WL 5300, *1 (1855) (affirming fifteen-minute limit in a simple case, but noting "There are cases in which the time necessary to a proper and fair elucidation of the matters involved in the prosecution, must be greater then and others.").

purposes of 28 U.S.C. § 2254(d)(1) "does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). Rather, "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

As this Court has explained, "'clearly established Federal law' under § 2254(d)(1) is the *governing legal principle or principles* set forth by the Supreme Court at the time the state court renders its decision." *Andrade*, 538 U.S. at 71-72 (emphasis added). These principles guide the Section 2254(d)(1) analysis. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 258 (2007) ("ignoring the fundamental principles established by [the Supreme Court's] most relevant precedents" may be contrary to or an unreasonable application of clearly established federal law).

"Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). The right to

participate fully and fairly in the adversary system by having counsel present proper argument is just such a fundamental right. *See Herring*, 422 U.S. at 858, 862 (describing the right to have counsel make a proper argument in summation as a "basic element of the adversary fact-finding process" and beyond compare in importance to partisan advocacy, the "very premise of our adversary system").

This Court has repeatedly relied on the legal principles underlying this Court's cases in defining clearly established law. For example, in *Thaler v. Haynes*, 559 U.S. 43, 47 (2010) (per curiam) this Court described *Batson v. Kentucky*, 476 U.S. 79 (1986), as requiring "a judge ruling on an objection to a peremptory challenge to undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" instead of *Batson's* most narrow fact-bound holding—to overrule *Swain v. Alabama*, 380 U.S. 202 (1965), and hold that a defendant could establish a *prima facie* case of discrimination in the use of a preemptory challenge. *Id.* at 47 (internal quotation marks omitted); *Accord Bell v. Cone*, 535 U.S. 685, 695-6 (2002) (legal principle of *United States v. Cronic*, 466 U.S. 648, 659 (1984), includes its discussion of three hypothetical denials of counsel in which prejudice would be presumed, instead *Cronic's* most limited facts: that giving a young

inexperienced lawyer 25 days to prepare for trial in a complex and grave case was not *per se* denial of counsel); *Yarborough v. Alvarado*, 541 U.S. at 662 (citing as clearly established law a footnote from *Berkemer v. McCarty*, 468 U.S. 420, 422-3 (1984), that cited a New York State court decision finding an objective custodial test preferable to a subjective one, instead of the most limited holding of *McCarty*, that *Miranda v. Arizona*, 384 U.S. 436 (1966), applied to misdemeanor offenses and that the roadside questioning of a motorist did not constitute a custodial interrogation) (citing *McCarty*, 468 U.S. at 442, n.35 (quoting *People v. P.*, 21 N.Y.2d 1, 9-10 (1967))).

3. The State's remaining arguments are quickly resolved. First, *Herring's* legal principle governs Mr. Frost's case and does not require the recognition of another implied right, as the State argues. Pet. at 15. Consequently, the State's reference to *Kane v. Garcia Espitia*, 546 U.S. 9 (2005), is misplaced. In *Espitia*, this Court found that the Sixth Amendment right to self-representation does not encompass the right to adequate access to a law library because the lead case, *Faretta v. California*, 422 U.S. 806 (1975), "says *nothing* about any specific legal aid that the State owes a *pro se* criminal defendant." 546 U.S. at 10 (emphasis added). In contrast, *Herring* specifically referred to summation as the last opportunity to convince the jury "there may

be reasonable doubt." *Herring*, 422 U.S. at 862 (citing *Winship*, 397 U.S. 358). And due process requires the court to hold the prosecution to its heavy burden of proof beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993).

Nor did the Ninth Circuit opinion introduce a new rule "'under the guise of extensions to existing law.'" *White v. Woodall*, 134 S.Ct. at 1706 (quoting *Alvardo*, 541 U.S. at 666). The Ninth Circuit did not rely on a general principle, but on *Herring*'s more limited rule that it is structural error to deny the defendant's Sixth Amendment right to "make a proper argument on the evidence and the applicable law in his favor." *Herring*, 422 U.S. at 860.

B. The Ninth Circuit Opinion Is Consistent with this Court's Structural Error Case Law.

This Court has repeatedly referred to *Herring* error as structural error. *See Cone*, 535 U.S. at 696 (including *Herring* among cases "where we found a Sixth Amendment error without requiring a showing of prejudice."); *Cronic*, 466 U.S. at 659, n.25 (listing *Herring* error as one "the Court has uniformly found constitutional error without any showing of prejudice"). Notwithstanding this Court's repeated affirmations, the State argues this Court should grant *certiorari* because the Ninth Circuit opinion "expands structural error law" by finding *Herring* error structural. According to the

State, *Herring* never concluded that denying the defendant the right to make a proper summation was "structural;" it only concluded it was error. Pet. at 21. This question is not worthy of *certiorari* because the State is flat wrong.

1. *Herring* held that denying the right to "'make a proper argument on the law and applicable law'" was structural error. *Herring*, 422 U.S. at 860 (quoting *Yopp*, 178 A.2d at 881). *Herring* concluded that denying a legitimate argument in summation struck at the very framework of the adversarial system of criminal justice. *Id.* at 862. Summation was a "basic element" of the factfinding process and the most important expression of partisan advocacy, "[t]he very premise of our adversary system of justice." *Id.* As *Herring* explained, "no aspect" of the advocacy essential to that adversarial process "could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* at 862.

This Court has used similar language to describe structural error. *See, e.g., Rose v. Clark*, 478 U.S. 570, 578 n. 6 (1986) (structural errors abort or deny the basic trial process); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (describing structural errors as ones that "affect[] the framework within which the trial proceeds"). And in assessing whether an error is structural or subject to harmless error review, this Court looks to see whether the defendant has

"received a full opportunity to put on evidence and make argument to support his claim of innocence." *Clark*, 478 U.S. at 579.

Herring's conclusion that "[t]here is no way to know" whether "appropriate arguments in summation might have affected the ultimate judgment[,]" 422 U.S. at 864, is a hallmark of structural error. *See Gonzalez-Lopez*, 548 U.S. at 149, n.4 ("here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.") (citations omitted); *Sullivan*, 508 U.S. at 282 (defective reasonable-doubt instruction produces "consequences that are necessarily unquantifiable and indeterminate[.]"). And the fact that *Herring* vacated the conviction without analyzing harm is also significant because, prior to *Herring*, this Court had recognized that constitutional errors could be harmless. *See Chapman v. California*, 386 U.S. 18 (1967). *Cf. Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008) (noting that cases decided before *Chapman* had no reason to address whether constitutional error could be harmless).

Finally, the fact that the state interfered with Mr. Frost's Sixth Amendment right to counsel reinforces that the violation is structural. In *Strickland v. Washington*, this Court noted that "[i]n certain Sixth Amendment contexts, prejudice is presumed [including] various kinds of state interference

with counsel's assistance. . . . such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." 466 U.S. 668, 692 (1984).

Herring also recognized that state interference with counsel's "opportunity to participate fully and fairly" constitutes Sixth Amendment structural error. The right to assistance of counsel, *Herring* explained, "has been understood to mean that there can be no restrictions upon the functioning of counsel in defending a criminal prosecution." 422 U.S. at 857. *Herring* relied on *Brooks v. Tennessee*, 406 U.S. 605, 612–613 (1972), and *Ferguson v. Georgia*, 365 U.S. 570 (1961), which respectively struck down statutes that restricted when counsel may call her client to testify or prevented defense counsel from conducting a direct examination of her client at trial. Like *Herring*, these limitations denied the accused the "guiding hand of counsel," *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (quoted in *Brooks*, 406 U.S. at 613; *Ferguson*, 365 U.S. at 594-95), and were *per se* reversible error.

2. The State argues that the Ninth Circuit's application of *Herring* results in a "nebulous" rule that calls into question any number of convictions where evidence was excluded or questioning was barred. Pet. at 22-3 (citing

Crane v. Kentucky, 476 U.S. 683 (1986) (harmless error applied to barring evidence of coerced confession), and *Delaware v. Van Ardall*, 475 U.S. 673 (1986) (harmless error to refuse to permit counsel to question regarding deal for key witness). This argument fails because *Herring* is limited to summation, and not argument at any of point of trial. 422 U.S. at 863, n.13.

Nor did the Ninth Circuit expand the law when it found that compelling Mr. Frost to concede guilt beyond a reasonable doubt was structural error. The State's argument to the contrary relies exclusively on cases that apply harmless error analysis to erroneous jury instructions based on the assumption that the trial was fundamentally fair and a reliable vehicle for determining guilt. Pet. at 18, n.4. (citing *Neder v. United States*, 527 U.S. 1, 9-10 (1999); *Yates v. Evatt*, 500 U.S. 391 (1991); *Carella v. California*, 491 U.S. 263 (1989); *Pope v. Illinois*, 481 U.S. 497 (1987); *Washington v. Recuenco*, 548 U.S. 212 (2006)).

In contrast, and what was denied in this case, permitting defense counsel to challenge the sufficiency of the prosecution's evidence before the jury is a basic protection that is indispensable to the trial's fundamental fairness and reliability. *See, e.g., Clark*, 478 U.S. at 578 ("Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may

present evidence *and argument* before an impartial judge and jury.") (emphasis added); *Neder*, 527 U.S. at 8-9 (structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'") (quoting *Clark*, at 577-78). Denying this right lowered the prosecution's burden of proof, *Frost I*, 161 P.3d at 368, and rendered the trial fundamentally unfair.

The error, here, did not concern a single missing element from a jury instruction or an erroneous permissive inference. Rather, Mr. Frost's counsel was ordered to concede guilt on each and every element of the offenses. *See Herrera v. Collins*, 506 U.S. 390, 398 (1993) (noting the defendant's due process right to insist that guilt be proven beyond a reasonable doubt) (citing *Winship*, 397 U.S. 358). "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic*, 466 U.S. at 657.

C. The Ninth Circuit Opinion Does Not Conflict with a Federal Due Process Case or State Affirmative Defense Law.

The State claims the Ninth Circuit decision here "essentially held" that due process prohibits *ever* requiring the defendant to choose between

reasonable doubt and an affirmative defense, even when state law requires it. Pet. at 19. This holding, the State argues, conflicts with *dictum* from *United States v. Russell*, 411 U.S. 423 (1973), that an entrapment defense is not of a constitutional dimension, *id.* at 433, and the law in several states requiring defendants to admit an offense before claiming an entrapment defense, *see* Pet. at 17 (citing cases), as well as a circuit court decision upholding one such law against a due process challenge. *See Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (*en banc*). This argument is unworthy of *certiorari* because the Ninth Circuit's *en banc* decision contains no such holding.

The Washington Supreme Court concluded that the trial court's error, not state affirmative defense law, cost Mr. Frost his right to challenge the sufficiency of the evidence in summation and lowered the prosecution's burden of proof. *Frost I*, 757 F.3d at 368 (citing *Winship*, 397 U.S. at 364). Washington law entitled Mr. Frost to argue that he acted under duress and the prosecution failed to prove that he participated in his accomplices' criminal acts "with adequate knowledge of promotion or facilitation." *Frost I*, 161 P.3d at 368. This decision bound the Ninth Circuit. *See Bradshaw v. Rickey*, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal, binds a federal court sitting in habeas corpus").

For this reason, the State's reliance on *Eaglin v. Welborn*, 57 F.3d 496 (7th Cir. 1995) (*en banc*), is misplaced. *Eaglin* concerned a due process challenge to an Illinois common law rule that barred the defendant from pleading entrapment without admitting the *actus reus* (but not the *mens rea*) of the offense. *Id.* at 498. The Seventh Circuit concluded the rule did not violate due process because entrapment was not a federally-guaranteed defense, leaving Illinois "free within extremely broad limits to decide upon the elements of a crime." *Id.* at 500. The court cautioned, however, that once a state defines the elements of an offense, "it may not convict without proof beyond a reasonable doubt that every element was present[.]" *Id.* (citing *Winship*, 397 U.S. at 364.) *See also Patterson v. New York*, 432 U.S. 197, 211, n.11 (1977) ("The applicability of the reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged in any given case.").

In this case, the prosecution was required to prove every element of accessorial liability beyond a reasonable doubt. *Eaglin*, 57 F.3d at 500 (citing *Winship*, 397 U.S. at 364). "By preventing defense counsel from arguing reasonable doubt in closing, the trial judge 'lessened the state's burden to some degree' and 'infringed upon Frost's due process rights.'" *Frost II*, 757 F.3d at

914 (quoting *Frost I*, 161 P.3d at 368). Precluding Mr. Frost from challenging the prosecution's proof beyond a reasonable doubt, while leaving the prosecution free to present whatever arguments it wanted, was a far more egregious affront to the adversary system of criminal justice than *Herring's* equal denial of summation to both parties because it struck at the presumption of innocence. *Frost II*, 757 F.3d at 916.

Given the lack of conflict with this Court's opinions, and absence of a circuit split or conflict with any state court of last resort, the petition is simply a request for this Court to correct what the State perceives to be an erroneous decision. This Court should deny *certiorari* not only because this Court is not primarily a court of error correction, *see* S. Ct. Rule 10, but also because the Ninth Circuit's decision was correct.

The State's argument that *Herring* means nothing more than that the accused has a right to say *something* in summation betrays *Herring's* true and stated purpose: to vindicate the defendant's Sixth Amendment right to participate "fully and fairly" in the adversary proceeding. 422 U.S. at 858. A ten-second summation[7] and the complete preclusion of a proper defense theory in summation simply cannot be squared with *Herring*'s recognition of the "right

[7] *See* page 18, footnote 3, *supra*.

to present proper argument on the evidence and law in his favor." 422 U.S. at 859 (quoting *Yopp*, 178 A.2d at 881).

CONCLUSION

For these reasons, this Court should deny the petition for *certiorari*.

Respectfully submitted,

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September 29, 2014

APPENDIX

Description **Page**

Excerpt of Verbatim Report of Proceedings
December 11, 2003 (prosecution rebuttal summation)
State of Washington v. Joshua Frost,
Superior Court Cause No. 03-1-01034-7KNT.....2a

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff,	
Vs.	NO. 03-1-01034-7KNT
JOSHUA FROST, Defendant.	COA NO. 53767-9-I

ORIGINAL

VERBATIM REPORT OF PROCEEDINGS

BEFORE THE HONORABLE CATHERINE SHAFFER, JUDGE
KING COUNTY SUPERIOR COURT
KENT, WASHINGTON

DECEMBER 11, 2003

APPEARANCES:

FOR THE PLAINTIFF: ZACH WAGNILD
DEPUTY PROSECUTING ATTORNEY

FOR THE DEFENDANT: JERRY STIMMEL
ATTORNEY AT LAW

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STATE OF WASHINGTON
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VICTORIA RACCAGNO
OFFICIAL COURT REPORTER

ENT'D.

assault. He had nothing to do with assaulting anyone and as to Kurt Sears nobody assaulted him. I hope those will be the verdicts you reach. And you will have to struggle with it, I know, because it is a painful case. But the particular focus I believe is the special verdicts, not armed with a firearm. Joshua Frost asks you -- it asks you was Joshua Frost armed with a firearm. The answer should be no on all of those. Thanks.

THE COURT: Thank you very much, Mr. Stimmel. Ladies and gentlemen, once again the state has the opportunity to address you on rebuttal. Please give your attention to Mr. Wagnild on behalf of the state.

MR. WAGNILD: Thank you very much, your Honor.

Ladies and gentlemen, noticeably absent from Mr. Stimmel's closing argument is reference to the law. There is a reason for that. Because if Mr. Stimmel had pointed you to the law and pointed to the elements of the offenses and he pointed to the firearm instruction and made his argument you would realize that his argument is phoney, his arguments don't match up with what the law is and that is really what we are here for.

He starts out by saying, well, we will throw you a bone, we will give you the Gapp robberies. Why? They

are just so bad that you would have a hard time finding him not guilty. For the life of me I don't understand that argument. You don't find someone guilty because the crime is so bad that you just have to punish someone. I am not asking you to do that. I am asking you to find Mr. Frost guilty because he took part in this robbery because he was an accomplice to this robbery, that is why he is guilty, not because Mr. and Mrs. Gapp are elderly, not because Mr. Gapp's rib was broken, not because Mrs. Gapp was hit in the face. You will find him guilty because he was involved.

And somehow, somehow Mr. Stimmel then tries to separate out the Gapp robbery from the rest of them. But there is no difference here. I mean, sure, he went in during the Gapp robbery, but the rest of them he was simply the driver. He was involved. His role changed. Whereas Mr. Williams and Alexander Shelton's roles stay the same and Mr. Frost's role changed, that doesn't make him any less guilty. He is no different. And then he asks you not to find him guilty of the burglary charge? Why? Not for any legal reason. Just because, you know, it is not really what the intent was.

Look at the jury instructions. Just look at the

elements of burglary in the first degree. Of course that was their intent. They unlawfully entered. They assaulted somebody. They unlawfully entered the house with an intent to commit a crime. That is what I need to prove. He raises the issue of whether or not I am trying to say that Mr. Frost was in the 7/Eleven store and the Ronnie's Market store. Quite frankly, I just don't know. We just can't tell. There is an interesting argument to be made there. First of all, we know that Alexander Shelton wears glasses, and when you look either at the video or you look at the pictures, say from the 7/Eleven robbery, it is difficult to see any glasses. They are not the clearest pictures but it is difficult to see glasses on the subject on the one that is not the African-American male.

We also know that Mr. Frost does an exceptional job of trying to minimize his involvement. So it would be quite likely that he would say he drove in all of them and, in fact, he was involved. We also know that Eddy Shaw, who knows these individuals, looked at him and immediately recognized this to be someone who looks just like Mr. Frost. Was it Mr. Frost who entered the stores? I just don't know. It could be. Might not be. But it doesn't really

matter for the purposes of finding him guilty, because even if it wasn't him who went into the stores, we know it was him that drove them and then drove away. So we know he was an accomplice, we just don't know if he was the person that went inside.

And, finally, I want to talk about firearms enhancement, these special verdict forms, because Mr. Stimmel dedicated a lot of his closing to that. He says at one point that he is trying -- they want to divorce themselves from the guns. Well, I have got news for the defense, it is too late for that. If Mr. Frost wanted to divorce himself from the guns you don't do it at trial. You do it when your accomplices are pulling out loaded firearms and heading into stores to rob them, that is when you divorce yourself from guns. It is too late. Mr. Frost is already bound to those guns. He tells you that he wants you to exonerate his client on the firearm enhancement and yet not once does he say, hey, why don't you look at instruction number 34. If you look at instruction 34 at the very bottom it says if one participates in a crime armed with a firearm all accomplices to that who participated in the crime charged are deemed to be so armed even if only one firearm is involved. As long as Mr. Frost is an accomplice to these robberies and

as long as one other participant is armed with a firearm, he is, too. That is what the law is. All I am asking you to do is follow the law.

Mr. Stimmel has simply pointed you to one reason why you shouldn't just simply follow the law on that. The answer is you should. That is what we are here for.

We talked about this in jury selection. Some of it you may not be sure you completely agree with it, but the fact is what we are here to do is look at the facts and apply it to the law. The law is clear, if one participant was involved with carrying a firearm, they all are.

Ladies and gentlemen, I am not asking you to find Mr. Frost guilty because these were violent crimes, I am not asking to you find him guilty because the Gapps are old, I am not asking you to find him guilty because someone was shot. I am asking you to find Mr. Frost guilty because he is guilty, because he was an accomplice to every one of the crimes charged. Thank you very much.

THE COURT: Thank you very much, Mr. Wagnild. All right, ladies and gentlemen. We have got a little more business with you this point, and our first order of business with you since you have all patiently

No. 14-95

In The Supreme Court Of The United States

PATRICK GLEBE, SUPERINTENDENT
STAFFORD CREEK CORRECTIONS CENTER,

PETITIONER,

v.

JOSHUA JAMES FROST,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent offers several reasons why this Court should deny certiorari. None withstands scrutiny.

First, Frost claims that because habeas cases are not the proper forum to extend this Court's precedent, this case is a "poor vehicle" to assess the scope of *Herring v. New York*, 422 U.S. 853 (1975). Br. Opp'n 9. But this argument would call for denying certiorari in every habeas case, and ignores that the Ninth Circuit in this case did exactly what Frost recognizes courts should not do in habeas cases: it created new law on an issue never resolved by this Court.

Frost also asserts that the Ninth Circuit's decision will affect only the rare case. But this was an en banc decision of the Nation's largest circuit court holding that "preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a. This broad holding calls into question any conviction in the Ninth Circuit in which a trial court ruling "prevent[ed] a defendant from arguing a legitimate defense theory" in closing. App. 11a. Such errors are far from rare, ranging from time limits on closing argument to rulings earlier in a trial that limit a defendant's ability to argue his preferred theory in closing.

Frost next claims that there is no conflict between the Ninth Circuit's decision and decisions of other courts because, in his view, no other case involved every element present here. But the Ninth Circuit's holding was clear: "Precluding defense counsel from arguing a legitimate defense theory

would, *by itself*, constitute structural error." App. 12a (emphasis added). As the State pointed out in its petition, there are many contrary cases. Frost cannot wish them away by reframing what the Ninth Circuit actually held.

Finally, Frost claims there is no conflict with this Court's cases because *Herring* established a broad right to present "proper argument" in summation. But *Herring* addressed only the complete denial of closing argument. The Ninth Circuit granted relief here only by impermissibly relying on its own precedent and ignoring this Court's cases.

ARGUMENT

A. This Case Is An Excellent Vehicle To Consider An Important Issue

1. Frost's Objection To This Case As A Vehicle Would Preclude Review In Every Habeas Case

Frost claims that this case is a poor vehicle because it is a habeas case, so the issue would be whether the law is "clearly established." He argues that the Court would thus be unable to provide broad "guidance." Br. Opp'n 9. But if that were a legitimate objection to granting certiorari, the Court would never take habeas cases. Of course, the Court hears many such cases every term, and with good reason. Habeas cases allow the Court to clarify what principles are and are not clearly established, an important responsibility given the thousands of habeas cases federal courts hear every year and the federalism implications of overruling long-final state

convictions. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (recognizing "AEDPA's purpose to further the principles of comity, finality, and federalism"). Such review is particularly important where, as here, the issue involved is significant and has caused confusion in lower courts.

2. The Question Presented Is Important.

Frost also claims that certiorari is unwarranted because the type of error here "is rare" and the Ninth Circuit's ruling will impact only cases "involving exactly this type of" error, i.e., where a judge erroneously prevents a defendant from arguing inconsistent defenses in closing. Br. Opp'n 9. He can make these claims only by ignoring what the Ninth Circuit held.

As Frost admits, the Ninth Circuit "'held that preventing a defendant from arguing a legitimate defense theory constitutes structural error.'" Br. Opp'n 16 (quoting *Frost v. Van Boening*, 757 F.3d 910, 916 (9th Cir. 2014)). This broad ruling will have significant consequences, because any number of trial errors effectively "prevent[] a defendant from arguing a legitimate defense theory." Br. Opp'n 16 (quoting *Frost*, 757 F.3d at 916). As Judge Tallman's dissent pointed out, for example, "if structural error is found in this case, how could we say that structural error does not also occur when a trial judge improperly excludes exculpatory evidence without regard to materiality and forbids defense counsel from commenting on it in closing?" App. 26a-27a. Indeed, a district court in the Ninth Circuit has already relied on *Frost* to grant habeas relief where

the trial court's exclusion of evidence prevented a defendant from arguing a theory in closing. *See DaSilva v. Law*, No. CV 13-25-gf-dwm-rks, 2014 WL 2004385 (D. Mont. May 15, 2014) (finding structural error and granting habeas relief based on *Frost* where state court barred defendant from presenting evidence as to whether prior conviction counted as a "sexual offense" under state law).

Similarly, as Judge Tallman pointed out, under the majority's ruling, "[s]tructural error may also be found when a trial judge improperly restricts closing argument by imposing time limitations that necessarily require the defense to choose among multiple arguments to emphasize during summation." App. 27a. This issue arises frequently and courts routinely review such time limits for abuse of discretion and require a showing of prejudice.[1]

Moreover, the Ninth Circuit's broad rule could require a finding of structural error "when[ever] a judge adopts any number of limitations that inhibit defense counsel from making their most effective and comprehensive arguments supporting a defendant's innocence[.]" App. 27a. For example, if the court erroneously precluded defense counsel from arguing that his client's confession was coerced or from asking a witness about the deal he received from the prosecution, that would "prevent[] a defendant from

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[1] *See, e.g.*, *United States v. Okoronkwo*, 46 F.3d 426, 437 (5th Cir. 1995); *United States v. Bednar*, 728 F.2d 1043, 1049 (8th Cir. 1984); *United States v. Barrett*, 766 F.2d 609, 621 (1st Cir. 1985).

arguing a legitimate defense theory[.]" App. 11a. Such errors are common enough that both have been reviewed by this Court, and this Court reviewed them for harmlessness. *See Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (trial court barred evidence that confession was coerced); *Delaware v. Van Arsdall*, 475 U.S. 673, 674 (1986) (trial court barred questioning about witness's deal with prosecution).

As these examples illustrate, it is far from "rare" for a trial court error to "prevent[] a defendant from arguing a legitimate defense theory[.]" App. 11a. Such errors occur regularly, and are routinely reviewed for harmlessness under this Court's precedent. The largest Circuit in the country has adopted a contrary rule in an en banc opinion. This issue is important.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Many Other Courts

1. The Vast Majority Of Courts Review Restrictions On Closing Argument For Harmlessness

The Ninth Circuit deemed it clearly established federal law "that preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a. The State's petition cited many contrary cases. Pet. at 24-28. Unable to distinguish these cases, Frost relegates most to a footnote, Br. Opp'n 11 n.2, offering two unsupportable distinctions. Both fail.

First, Frost claims that none of these cases "involv[ed] exactly this type of" error. Br. Opp'n 9. But the question this Court considers is not whether

lower courts reach different results on the exact same facts—the Court would never hear a case under that test. Rather, the question is whether lower courts disagree "on the same important matter[.]" R. 10(a). Here, there is a conflict as to whether it is clearly established "that preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a.

Second, Frost claims that none of the other cases involved what he contends occurred here: both "complete preemption of a legitimate defense theory and . . . lower[ing] the state's burden of proof." Br. Opp'n 11. This is beside the point and incorrect.

It is beside the point because the Ninth Circuit did not require both of these elements to find structural error. Instead, the Ninth Circuit said that "[p]recluding defense counsel from arguing a legitimate defense theory would, *by itself*, constitute structural error." App. 12a (emphasis added). Frost cannot distinguish this holding from other cases by modifying it after the fact.

Frost's distinction is also incorrect, as many of the cases the State cited did involve a court completely preventing a defendant from presenting a theory and effectively lowering the prosecution's burden of proof. For example, in *United States v. Poindexter*, 942 F.2d 354 (6th Cir. 1991), defense counsel wanted to argue that the lack of fingerprint evidence established reasonable doubt, a legitimate theory contesting the prosecutor's burden of proof. The Sixth Circuit reviewed the error for harmlessness. *Id.* Similarly, in

United States v. DeLoach, 504 F.2d 185 (D.C. Cir. 1974), defense counsel sought to argue in closing that the key witness against the defendant might have committed the murder himself. *Id.* at 189. The trial court barred this argument, helping the state meet its burden of proof and "entirely preclud[ing] counsel from arguing for the several inferences on which his case crucially depended." *Id.* at 190. But the D.C. Circuit reviewed for harmlessness. *Id.* at 191-93.

Attempting to distract from these examples, Frost focuses on *Richardson v. Bowersox*, 188 F.3d 973 (8th Cir. 1999), which the State cited in passing as one of three Eighth Circuit cases reviewing a restriction on closing argument for harmlessness. Pet. at 24. Frost does not dispute the key point: the Eighth Circuit has repeatedly held that restrictions on closing argument are reviewed for harmlessness. Indeed, in *United States v. Wilcox*, 487 F.3d 1163 (8th Cir. 2007), the Eighth Circuit case the State described as "most analogous," Pet. at 25, but that Frost relegates to a footnote, the trial court completely barred the defendant from arguing the lack of physical evidence. The Eighth Circuit nonetheless "conclude[d] that any error in foreclosing this argument was harmless." *Wilcox*, 487 F.3d at 1173.

Frost also cannot meaningfully dispute that several state courts have adopted a rule contrary to the Ninth Circuit, holding that a defendant must show harm even from a significant restriction on closing argument. *See, e.g.*, *Lemos v. State*, 130 S.W.3d 888, 892 (Tex. Ct. App. 2004); *Nelson v. State*, 792 N.E.2d 588, 592 (Ind. Ct. App. 2003).

Even the state cases that Frost cites to suggest the absence of conflict actually prove the opposite. Frost cites *State v. Arline*, 223 Conn. 52 (1992). But, as the State noted in its petition, in deeming the restriction on closing argument there structural error, the Connecticut court did not even cite *Herring*, even though it cited *Herring* elsewhere. *Id.* at 63. Meanwhile, *Herdt v. State*, 816 P.2d 1299 (Wyo. 1991), does appear to treat *Herring* as resolving whether a restriction on closing argument is structural error, but this merely shows that, of the many courts to address this issue, one agreed with the Ninth Circuit. This only enhances the conflict.

In short, Frost cannot hide from the many cases the State cited that conflict with the rule adopted by the en banc Ninth Circuit here.

2. The Ninth Circuit Stands Alone In Suggesting It Is Unconstitutional To Require A Defendant To Admit The Elements Of An Offense To Claim An Affirmative Defense

The Ninth Circuit's decision conflicts with decisions of many other courts in another important respect. The majority indicated that by requiring Frost to choose between his inconsistent defenses, the trial court deprived him "of the fundamental right to demand that a jury find him guilty of all the elements of the crime." App. 13a (internal quotation marks omitted). But many states require a defendant to admit the elements of an offense before pleading an affirmative defense, and courts have routinely upheld such requirements. *See* Pet. at 28-30; Amicus Br. Arizona et al. 7-11.

Frost's argument that these cases are not in conflict with the decision below cannot bear analysis. He suggests that because Washington law allows a defendant to argue both that he did not commit the offense and that he committed the offense under duress, the Ninth Circuit's holding does not call into question the rules in states that prohibit such arguments. But for one thing, those states disagree. *See* Amicus Br. Arizona et al. 11-17. Moreover, the Ninth Circuit's opinion refutes Frost's distinction. The court did not say that where state law allows a defendant to argue in the alternative, he must be allowed to do so. Instead, the court said that requiring Frost to admit the elements of the offense to claim an affirmative defense "was tantamount to a directed verdict on guilt" and thus plainly unconstitutional. App. 13a. Under the Ninth Circuit's unsupportable reasoning, a state law requiring such a "directed verdict" would not avoid the constitutional problem. Thus, Frost's purported distinction cannot eliminate this conflict.

C. The Ninth Circuit's Decision Conflicts With Decisions Of This Court

1. The Ninth Circuit Improperly Relied On Its Own Precedent

The Ninth Circuit again ignored this Court's repeated admonition that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court[.]" 28 U.S.C. § 2254(d)(1). Frost offers two responses to this error.

First, Frost claims that *Herring* established that a restriction on arguing a "legitimate defense theory" is structural error, and that the Ninth

Circuit just applied this rule. *See, e.g.*, Br. Opp'n 7, 10-11. But the term "legitimate defense theory" is not found in *Herring* or any other Supreme Court decision. Instead, it is found only in circuit cases. Indeed, the Ninth Circuit, citing its own cases, noted: "*[W]e* have held that preventing a defendant from arguing a legitimate defense theory constitutes structural error." *See* App. 11a (emphasis added). This Ninth Circuit test is what did the work here.

Second, Frost claims there is no need for this Court to address this issue because "this Court has already settled that circuit law may not form the basis of habeas corpus relief." Br. Opp'n 15. This rule is abundantly clear, but the Ninth Circuit often "fail[s] to comply" with it anyway. *Lopez v. Smith*, No. 13-946, 2014 WL 4956764, *1 (U.S. Oct. 6, 2014) (per curiam). This failure continues, as evidenced by this case, App. 11A n.1, *Lopez*, and others, *see, e.g.*, *Woods v. Sinclair*, 764 F.3d 1109, 1121 (9th Cir. 2014) (considering circuit precedent), and warrants this Court's review.

2. The Ninth Circuit Went Beyond Any Holding Of This Court In Deeming The Error Here Structural

The Ninth Circuit's decision also conflicts with holdings of this Court because it interpreted *Herring*'s holding far too broadly and ignored this Court's cases on structural error.

As explained in the petition, neither *Herring* nor any decision of this Court clearly establishes that an erroneous limitation on closing argument is structural error. Pet. at 15-19.

The Ninth Circuit evaded this problem by concluding that this case "is easy because the Supreme Court has determined that *Herring* error is structural." App. 10a. Frost similarly claims that this case involves "*Herring* error." Br. Opp'n 16. But these assertions beg the question: was the error here "*Herring* error" at all given the dramatic difference between a judge prohibiting closing argument and requiring a defendant to choose between inconsistent defenses?

Like the Ninth Circuit, Frost seeks to avoid this question by claiming that *Herring* establishes "the right to present proper argument on the evidence and applicable law in summation[.]" Br. Opp'n 17. But *Herring* recognized no such broad right, and this is exactly the sort of generalized description of precedent that this Court has rejected in applying 28 U.S.C. § 2254(d). *See, e.g.*, *Lopez*, 2014 WL 4956764, at *3 ("We have before cautioned the lower courts—and the Ninth Circuit in particular—against 'framing our precedents at such a high level of generality.'" (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam))).

If *Herring* clearly established such a broad rule, then far more trial errors would be structural. Whenever a court misstated the "applicable law," Br. Opp'n 17, excluded evidence that would have allowed another argument in closing, or limited questioning of a witness in a way that prevented attacking his credibility in closing, the court would presumably have violated this clear "right to present proper argument[.]" Br. Opp'n 17. But this Court has reviewed each of these types of error for harmlessness. *See, e.g.*, *Pope v. Illinois*, 481 U.S. 497

(1987) (applying harmless error review where court misstated element of the offense); *Crane*, 476 U.S. 683 (same where court barred defendant from introducing evidence that confession was coerced); *Van Arsdall*, 475 U.S. 673 (same where court barred defendant from questioning witness about deal with prosecution).

Frost attempts to distinguish these cases by claiming that "*Herring* is limited to summation," while these cases involved errors at other points. Br. Opp'n 30. But these errors clearly affected summation by limiting the defendant's arguments. If the error in this case was structural, these would have been as well.

In a last ditch effort to broaden *Herring*, Frost suggests that its holding incorporates many state court cases it cited addressing lesser restrictions on closing argument. Br. Opp'n 20-21 & nn.4-6. But this Court has never suggested that state court cases it cites become "clearly established Federal law, as determined by the Supreme Court[.]" 28 U.S.C. § 2254(d)(1). Such a rule would make the task of state courts reviewing criminal convictions impossible, forcing them to scour every citation in this Court's opinions to discern the law. That cannot be right. Indeed, many of the cases cited in *Herring* rejected time limits on closing argument of over an hour.[2] If *Herring* clearly establishes that such limits

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[2] Br. Opp'n 21 n.6 (citing *State v. Ballenger*, 24 S.E.2d 175 (S.C. 1943) (rejecting one-hour time limit); *State v. Mayo*, 85 P. 251 (Wash. 1906) (rejecting ninety-minute time limit); *Weaver v. State*, 24 Ohio St. 584 (1874) (reversing five-hour time limit)).

are structural error, innumerable convictions are invalid. *See supra* n.1 (citing cases affirming far shorter time limits).

In short, Frost cannot reconcile the Ninth Circuit's holding with this Court's decisions.

CONCLUSION

For the reasons stated above, this Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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October 14, 2014

No. 14-95

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, ET AL., AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Does *Herring v. New York*, 422 U.S. 853 (1975), clearly establish that a limitation on closing argument is structural error, as the Ninth Circuit held here, or, as many other courts have held, does *Herring* allow the possibility that such a limitation is subject to harmless error review?

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STATUTES

28 U.S.C. § 2254(d) .... *passim*

INTEREST OF AMICI CURIAE[1]

The amici States have a strong interest in ensuring the finality of the convictions obtained in their states and in the consistent application of the deferential standard of review Congress imposed in the Antiterrorism and Effective Death Penalty Act (AEDPA). By looking to its own precedent and extending rules announced by this Court to determine "clearly established Federal law," the Ninth Circuit threatens both of these concerns and grants habeas relief in contradiction to AEDPA's deferential standards. 28 U.S.C. § 2254(d)(1) Unless the Court grants review, the law in the Ninth Circuit will remain that a State commits structural error by defining (as many states do) an affirmative defense to require the admission of the elements of the offense. *See Biggs v. Sec'y of Cal. Dep't Corr. & Rehab.*, 717 F.3d 678, 690 (9th Cir. 2013) (Courts in the Ninth Circuit are "bound to respect a panel holding that [a rule] is clearly established Supreme Court law in a given context, just like [they] would be bound to respect any other panel holding.").

STATEMENT

Frost was charged with several counts of burglary, robbery and assault. (Pet. at 5.) At trial, he admitted his involvement in most of the crimes, but asserted

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[1] Counsel of record received timely notice of the States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

duress as an affirmative defense.[2] (Pet. at 5–6.) The trial court informed Frost's counsel that if he argued in closing that the State had not met its burden to prove the elements of the offenses for which he was claiming duress, it would not instruct the jury on that defense. (*See* Pet. App. at 146a (trial court stating, "You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other."). Frost's counsel chose to argue that Frost committed the offenses under duress, and he did not challenge the State's proof on the elements of the offenses.

The Washington Supreme Court held that Frost should have been permitted under state law to argue both that he did not commit the offenses and that he committed them under duress. (*See* Pet. App. at 124a ("[T]his court did not hold [in an earlier case] that such inconsistent defenses would have been impermissible had defense counsel sought to raise them.") The court further held that the trial court violated Frost's Sixth and Fourteenth Amendment rights by requiring the defense to choose only one of the two conflicting defenses to argue. (Pet. App. at 126a.) It held, however, that the error was harmless and affirmed Frost's convictions. (Pet. App. at 128a–133a.) Both the

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[2] An affirmative defense typically requires a defendant to admit that he has committed an offense, but allows him to present evidence showing why he is not culpable—*i.e.*, he was entrapped or under duress when he committed the offense. Affirmative defenses are "in the nature of confession and avoidance—essentially admitting the crime, but proffering a reason why the defendant should not be found guilty." *United States v. Houston*, 481 Fed.Appx. 188, 192 n.3 (5th Cir. 2012) (mem.).

district court and the three-judge Ninth Circuit panel agreed that any error was harmless and denied relief to Frost. (Pet. App. at 92a–105a; 63a–64a.) Neither court found it necessary to consider whether the state court properly found that Frost's constitutional rights had been violated. (Pet. App. at 63a–64a, 91a n.3.)

On en banc review, the Ninth Circuit held that "the Washington Supreme Court correctly concluded [that] the state trial court unconstitutionally precluded defense counsel from arguing reasonable doubt, under both *Herring* and *Winship*."[3] (Pet. App. at 8a.) The en banc panel agreed that the trial court violated Frost's due process rights, but held that the Washington Supreme Court's conclusion that the error was subject to harmless error review was "contrary to clearly established Federal law." Instead, finding that *Herring* and *Winship* "clearly established" that the error was structural, the en banc panel granted habeas relief to Frost. (*See* Pet. App. at 17a–18a.)

SUMMARY OF ARGUMENT

Once again, the Ninth Circuit has failed to accord the proper deference to a state court's ruling on habeas review. Such deference requires that a federal court may not grant relief to a habeas petitioner unless the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C § 2254(d(1). This Court has never held that any error, let alone structural error, results when a State requires (as many do) that a defendant

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[3] *In re Winship*, 397 U.S. 358 (1970).

admit the elements of an offense before asserting an affirmative defense. Nevertheless, the Ninth Circuit held that such a procedure lessens the State's burden to demonstrate each element of an offense beyond a reasonable doubt, and improperly shifts the burden of proof to the defendant to prove the affirmative defense, in violation of *Winship*, *United States v. Gaudin*, 515 U.S. 506 (1995), *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). None of these cases, however, clearly establishes that any improper burden shifting results from a State's requirement that a defendant admit the elements of an offense before asserting an affirmative defense.

The en banc panel also improperly expanded this Court's ruling in *Herring*, which holds that the complete denial of closing argument is structural error, to apply when a defendant makes a closing argument but is foreclosed from arguing inconsistent defenses. Even if this Court ultimately agreed with the Ninth Circuit that such a requirement violates a defendant's constitutional rights, it has not yet "clearly established" such a rule, and the Ninth Circuit's grant of habeas relief failed to accord the proper deference to the Washington Supreme Court's finding that such an error can be harmless.

ARGUMENT

Affirmative defenses are not of "constitutional dimension" and therefore "Congress [and the states] may ... adopt any substantive definition of the defense that it may find desirable." *United States v. Russell*, 411 U.S. 423, 433 (1973) (considering the defense of entrapment). The en banc panel held both that (1) a due process violation results from requiring a

defendant to admit the elements of an offense before presenting an affirmative defense and requiring him to argue consistent with this defense; and (2) the law is clearly established that this error is structural, requiring reversal. It could reach these conclusions, however, only by improperly extending this Court's precedent and relying on its own circuit precedent. In so doing, the en banc panel failed to accord deference to the Washington Supreme Court's finding that any error was amenable to harmless error review.

That failure warrants this Court's intervention. AEDPA permits a federal court to grant habeas relief to a defendant who has been convicted in state court if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). This standard is highly deferential to state court decisions, and this Court has repeatedly rebuked the lower courts when they failed to apply this "demanding standard" of deference. *Metrish v. Lancaster*, 133 S. Ct. 1781, 1784 (2013). Most recently, just 6 days before the Ninth Circuit issued its ruling in this case, this Court chided the Sixth Circuit for "disregard[ing] the limitations of 28 U.S.C. § 2254(d)—a provision of law that some federal judges find too confining, but that all federal judges must obey." *White v. Woodall*, 134 S. Ct. 1697, 1701 (2014); *see also Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) ("[T]he Sixth Circuit improperly set aside a reasonable state-court determination of fact in favor of its own debatable interpretation of the record." (internal quotation marks and alteration omitted)); *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) ("In ... collapsing the distinction between an *unreasonable* application of federal law and

what a lower court believes to be an *incorrect or erroneous* application of federal law, the Ninth Circuit's approach would defeat the substantial deference that AEDPA requires." (Internal quotation marks and citation omitted); *Lancaster*, 133 S. Ct. at 1792 (reversing the Sixth Circuit's grant of habeas relief because "[f]airminded jurists could conclude that [the] state supreme court decision ... is not unexpected and indefensible by reference to existing law." (Internal quotation marks and alteration omitted)); *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013) ("[T]he Ninth Circuit declined to apply the deferential standard of review contained in § 2254(d).").

Here, the Ninth Circuit relied on its own precedent and improperly extended this Court's holding in *Herring v. New York*, 422 U.S. 853 (1975), to find a "clearly established" rule on an issue this Court has never addressed, let alone held: that a trial court commits structural error by requiring a defendant to admit the elements of an offense before presenting an affirmative defense. That flouting of the limits Congress imposed in AEDPA should not stand.

I. This Court has never "clearly established" that a trial court violates a defendant's due process rights by requiring him to admit the elements of an offense before asserting an affirmative defense; it could not, therefore, have held that such a procedure is structural error.

As noted above, the trial court required Frost to choose between arguing that the State had not proven the elements of the offenses beyond reasonable doubt, or admitting the offenses and asserting that he

committed them under duress. (Pet. App. at 146a.) While the Washington Supreme Court found this to be error, many states adopt the procedure used by the trial court, and this Court has never held that this procedure violates a defendant's due process rights. It could not, therefore, have "clearly established" that this procedure is structural error.

A. State courts around the nation have held that defendants can be put to the choice of admitting the elements of the offense or asserting an affirmative defense.

Although substantive federal criminal law does not require a defendant to admit the elements of the offense before he may assert an affirmative defense, many states have chosen to impose that requirement. Interpreting a federal statute, this Court held that, "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews v. United States*, 485 U.S. 58, 62 (1988). The States are not required to follow suit, however, but are free to define affirmative defenses as they see fit. As a Georgia appellate court explained, "the *Mathews* court did not recognize an entitlement to instructions on inconsistent affirmative defenses as a matter of constitutional dimension, but rather merely resolved the issue in federal courts under federal rules of criminal procedure." *Ray v. State*, 383 S.E.2d 364, 366 (Ga. Ct. App. 1989) (internal citation omitted)

In fact, the federal rule (and that adopted by the Washington Supreme Court) permitting a defendant to argue *both* that he did not commit a crime *and* that he

was justified in committing it (*i.e.* he was entrapped or under duress) may "encourage perjury, lead to jury confusion, and subvert the truth-finding function of the trial." *Mathews*, 485 U.S. at 65. The Arizona Supreme Court concluded it would not follow *Mathews* for that very reason:

> When a defendant testifies that he did not commit the elements of the offense charged, the entrapment defense is not a plausible alternate legal theory of the case. *Entrapment is a proper defense under these circumstances only if the accused is lying.* We do not believe that the defendant has a right to lie at trial or a right to solicit his attorney's aid in executing such a defense strategy.... *Requiring a trial court to entertain an entrapment defense when the defendant has not admitted all elements of the crime does not serve the cause of criminal justice.*

State v. Soule, 811 P.2d 1071, 1074 (Ariz. 1991) (emphasis added; internal citations omitted)

Many other states also require a defendant to admit the elements of an offense before asserting an affirmative defense. *See, e.g.*, *Weaver v. State*, 3 S.W.3d 323, 325 (Ark. 1999) ("Our law is well established that, if a defendant denies committing an offense, he cannot assert that he was entrapped into committing the offense."); *People v. Frye*, 10 Cal. Rptr. 2d 217, 223 (Cal. Ct. App. 1992) ("[A]n affirmative defense is one which presumes the prima facie elements of the crime are true, but exculpates the defendant because of excuse or justification."); *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) ("'[A]ffirmative' defenses ... admit the defendant's commission of the elements of the charged

act, but seek to justify, excuse, or mitigate the commission of the act."); *Hicks v. State*, 695 S.E.2d 195, 197 (Ga. 2010) ("Each of these affirmative defenses requires that the defendant admit the crime before he can raise such defense." (Internal quotation marks omitted)); *People v. Arndt*, 814 N.E.2d 980, 990 (Ill. App. Ct. 2004) ("[T]he entrapment defense is not available to a defendant who denies any of the facts constituting the offense charged, including the requisite mental state."); *Melendez v. State*, 511 N.E.2d 454, 457 (Ind. 1987) ("An affirmative defense admits all the elements of the crime but proves circumstances which excuse the defendant from culpability."); *People v. Dupree*, 788 N.W.2d 399, 405 n.11 (Mich. 2010) ("An affirmative defense admits the crime but seeks to excuse or justify its commission."); *Hopson v. State*, 625 So.2d 395, 399 (Miss. 1993) ("[T]he well-established rule in Mississippi [is] that in order for one to use the affirmative defense of entrapment, one must admit that he or she committed the alleged offense."); *State v. Rhodes*, 590 N.E.2d 261, 269 (Ohio 1992) ("[A]n affirmative defense is in the nature of a 'confession and avoidance,' in which the defendant admits the elements of the crime, but seeks to prove some additional fact that absolves the defendant of guilt."); *Rodriguez v. State*, 368 S.W.3d 821, 825 (Tex. App. 2012) ("A defendant's failure to testify, stipulate, or otherwise proffer defensive evidence admitting that he engaged in the proscribed conduct prevents the defendant from benefitting from the defense of duress." (Internal quotation marks omitted)).

Some states withhold an instruction on an affirmative defense if the defendant does not affirmatively admit the elements of the offense. *See,*

e.g., *State v. Nilsen*, 657 P.2d 419, 420 (Ariz. 1983) (trial court erred in giving entrapment instruction where defendant "sat mute and made no active admission of the elements of the offense"); *State v. Heinz*, 473 A.2d 1242, 1247 (Conn. App. Ct. 1984) ("At no time did the defendant in this case admit that he committed the act charged. Thus, he was not entitled to an [affirmative defense instruction]."); *Olarte v. State*, 614 S.E.2d 213, 217 (Ga. Ct. App. 2005) ("[T]o establish an evidentiary foundation for an instruction on an affirmative defense, the defendant must admit to the crime charged." (Internal quotation marks omitted)); *Beets v. Commonwealth*, 437 S.W.2d 493, 496 (Ky. 1968) ("[An affirmative defense] instruction is not warranted except where the defendant admits the commission of the act charged against him but seeks to excuse or justify its commission."); *Rodriguez*, 368 S.W.3d at 825 ("Because appellant failed to testify, stipulate, or otherwise proffer defensive evidence admitting his commission of the underlying offense, we conclude that he was not entitled to a jury instruction on the affirmative defense of duress.").

Even though this Court has never held that a State violates a defendant's constitutional rights by requiring him to admit the elements of an offense before presenting an affirmative defense, the en banc panel here held that "the trial court violated Frost's due process rights under a long line of *clearly established Supreme Court precedent*." (Pet. App. at 15a (emphasis added).) That "precedent," the en banc panel held, established that Frost "was deprived of his right to demand that a jury find him guilty of all the elements of the crime[s]" and improperly shifted the burden of proof to Frost to prove the affirmative defense. As

discussed below, however, this Court has never "clearly established" that an affirmative defense violates a defendant's constitutional rights in these ways, let alone that structural error would result.

B. The State's burden was not lessened by Frost's choice to admit the elements and present a duress defense.

This Court has held that the prosecution must prove every element of an offense beyond a reasonable doubt. *Winship*, 397 U.S. at 364. But it has never held that this requirement is violated when a defendant must choose between contesting that he committed the offense and asserting an affirmative defense that is predicated on his commission of the offense. The en banc panel held that the trial court's requirement that Frost argue consistently with his chosen duress defense "forc[ed] defense counsel to concede guilt [and] amounted to an unconstitutional directed verdict." (Pet. App. 15a.) But Frost's counsel did not admit guilt, arguing instead that Frost was *not* criminally liable because he acted under duress. (*See* Pet. App. at 157a–158a). Further, as the dissent notes, it was Frost's *choice* to admit the elements and submit a duress defense:

> By requiring Frost to "opt for one [theory] or the other," the judge presented a choice to Frost as opposed to handing down a prohibition or mandate. And, although the judge may have hinted at his belief that abandoning the duress defense and electing to argue that the

> prosecution had not satisfied its burden of proof would be unwise, the judge did not usurp Frost's choice.

(Pet. App. at 31a.)

When a jury is properly instructed on the State's burden to prove each element beyond a reasonable doubt, that burden is not reduced by a defendant's decision to admit the elements of an offense and to present an affirmative defense.[4] *See Florida v. Nixon*, 543 U.S. 175, 188 (2004) (where defendant's attorney conceded guilt in opening statements, State was nevertheless "obliged to present ... competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged"). Thus, the en banc panel's reliance on *United States v. Gaudin*, 515 U.S. 506 (1995), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), as part of the "long line of clearly established Supreme Court precedent" establishing a due process violation, is misplaced. (Pet. App. at 15a.) In those cases the jury was improperly instructed on its duty to find the elements beyond a reasonable doubt. In *Gaudin*, the judge instructed the jury that the judge, and not the jury, would determine one of the elements of the offense. 515 U.S. at 508 ("[T]he issue of materiality is not submitted to [the jury] for your decision but rather is a matter for the decision of the court." (Internal quotation marks and alterations omitted)). In *Sullivan*, the trial court

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[4] The Washington Supreme Court, the district court, and the three-judge Ninth Circuit panel all agreed that Frost's jury was properly instructed on the State's burden to prove each element. (Pet. App. at 133a, 96a, 61a.)

instructed the jury on a definition of reasonable doubt that the Court had earlier found to be unconstitutional. 508 U.S. at 277. Neither case "clearly establishes" a due process violation when a jury is properly instructed on the State's burden.

Winship, *Gaudin*, and *Sullivan* do not clearly establish that the State's burden is lessened when the defendant admits the elements of the offenses in order to present an affirmative defense. They certainly do not establish any structural error in these circumstances.

C. A State may require a defendant to bear the burden to prove an affirmative defense.

Nor has this Court held—let alone clearly established—that the burden of proof improperly shifted to Frost by requiring him to prove that he acted under duress. To the contrary, this Court has held that a State may place the burden on a defendant to prove an affirmative defense:

> This affirmative defense ... does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; and ... New York has not violated the Due Process Clause, and Patterson's conviction must be sustained.

Patterson v. New York, 432 U.S. 197, 206–07 (1977); *see also Smith v. United States*, 133 S. Ct. 714, 719 (2013) ("The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense *does* negate an element of the crime." (Internal

quotation marks omitted)). Duress, like entrapment, admits that the defendant committed a crime but argues a justification for doing so. The defense "does not serve to negative any facts of the crime" and, if believed, relieves the defendant of criminal liability for his acts. Thus, the burden was properly on Frost to show duress.

Nevertheless, the en banc panel asserted that *Mullaney v. Wilbur*, 421 U.S. 684 (1975), "clearly establishes" that the burden of proof was "unconstitutionally shifted to Frost" and that this claimed error was structural. (Pet. App. at 15a.) *Mullaney* did nothing of the sort. In *Mullaney*, this Court considered "whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." 421 U.S. at 692. After concluding that, historically, heat of passion was "the single most important factor in determining the degree of culpability attaching to an unlawful homicide," the Court concluded that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 704, 696. This Court distinguished *Mullaney* in *Patterson*, noting that in *Mullaney*, "lack of provocation was presumed" in violation of due process. *Patterson*, 432 U.S. at 216. Under the affirmative defense at issue in *Patterson*, however, "nothing was presumed or implied," and placing the burden on the defendant to prove the defense did not violate due process. *Id.*

Thus, the en banc panel has misconstrued this Court's rulings in finding that a "long line of clearly established Supreme Court precedent" establishes a due process violation in the trial court's procedure, resulting in structural error.

D. A defendant does not have a constitutional right to argue inconsistent defense theories.

The Washington Supreme Court observed that "it is generally permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence." (Pet. App. at 120a (citing *Mathews*, 485 U.S. at 63).) The right to present inconsistent defenses, however, is not secured by the Constitution. The Sixth Circuit has explained that a court may prevent a defendant from presenting inconsistent defenses:

> Michigan law may well require a state court to let a defendant assert inconsistent defenses when supported by the evidence, and on occasion even federal courts might be required to offer instructions on inconsistent defenses when the evidence supports both instructions, *see Mathews*, 485 U.S. at 65–66, 108 S.Ct. 883. Not all states, however, follow this rule, and the right to present inconsistent defenses is not so widespread or well-established as to be a fundamental rule essential for due process.

Taylor v. Withrow, 288 F.3d 846, 854 (6th Cir. 2002) (some internal citations omitted); *see also People v. Garcia*, 826 P.2d 1259, 1263–64 (Colo. 1992) ("Garcia cannot claim that an intruder stabbed L.C. and at the same time obtain an instruction based on the theory

that he stabbed L.C. in the heat of passion."); *State v. Person*, 673 A.2d 463, 472 (Conn. 1996) (Norcott, J., concurring) ("I find it hard to accept that the right to present a defense includes the right to present to the jury a defense that the defendant's own testimony directly and conclusively contradicts."); *People v. Cooper*, 606 N.E.2d 705, 715 (Ill. App. Ct. 1992) ("[A] defendant may not choose alternative and inconsistent defenses, that is, claim at the same time that he did not commit the offense, but that if he did, he was entrapped."); *but see United States v. Trujillo*, 390 F.3d 1267, 1274 (10th Cir. 2004) (allowing inconsistent defenses); *Arcoren v. United States*, 929 F.2d 1235, 1245 (8th Cir. 1991) (same); *Johnson v. United States*, 426 F.2d 651, 656 (D.C. Cir. 1970) ("It is quite true that a defendant has the right to argue inconsistent defenses as Appellant did here.").

The Washington Supreme Court requires that a defendant be permitted to argue inconsistent defenses. (*See* Pet. App. at 120a.) Therefore, the Washington trial court erred as a matter of state law when it precluded Frost from making an inconsistent argument. But this Court has never held that a State violates a defendant's constitutional rights by requiring a defendant to admit the elements of an offense before asserting an affirmative defense, or by limiting closing argument so that it is consistent with that defense.

The Ninth Circuit's finding of structural error, where this Court has never found error of any kind, conflicts with the manner in which many states define affirmative defenses and promotes uncertainty among the states as to whether their established definitions of affirmative defenses will survive federal scrutiny. It

further threatens to overturn valid state convictions whenever a defendant chooses to present an affirmative defense and carries the burden to prove that defense. AEDPA does not authorize a federal court to grant habeas relief in such a situation.

II. The Ninth Circuit improperly extended *Herring* and relied on its own circuit precedent to find that any error was structural.

When considering a federal habeas petition brought by a prisoner in State custody, a federal court must defer to the State court's decision and may grant habeas relief only if the State court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (internal quotation marks omitted).

Here, even if the en banc panel were correct that the trial court violated Frost's Sixth Amendment and due process rights by requiring that he admit the elements of the offenses before asserting his affirmative defense, this Court has not "clearly established" that the error was structural. The en banc panel concluded otherwise only after improperly extending this Court's holding in *Herring* and relying on its own circuit precedent, failing to accord the state court's decision the proper deference in violation of

both AEDPA's requirements and this Court's precedent.

A. The en banc panel improperly extended Herring *to conclude that structural error occurred.*

In *Herring*, this Court held that the Sixth Amendment right to the assistance of counsel and to present a defense guarantees all defendants the right to make closing arguments at trial. 422 U.S. at 859 ("[A] total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense."). At the same time, this Court recognized the trial court's ability—and duty—to control argument:

> This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. . . . In all these respects he must have broad discretion.

Id. at 862. Thus, *Herring* expressly reserves to the trial court an ability to limit argument, and it is silent as to whether an improper restriction on closing argument is structural error.

In AEDPA terms, this Court has "clearly established" that a total denial of closing argument in a criminal trial is structural error. But it has not clearly established that an unconstitutional *partial* denial of closing argument is structural error. *Herring* did not address that issue; nor have any of this Court's cases since *Herring*. For this reason, even if the Washington Supreme Court was wrong in concluding

that the limit on closing argument here was subject to harmless-error review, AEDPA forecloses a grant of habeas relief.

Nevertheless, the en banc panel held that Frost's choice to present an affirmative defense, thereby admitting the elements of the offenses, "amounted to a total denial of closing argument on a legitimate defense theory and is thus squarely within the *Herring* rule." (Pet. App. at 17a.) Concluding that *Herring* error is always structural, the en banc panel reversed the Washington Supreme Court's finding of harmless error. (Pet. App. at 10a ("In assessing whether the error in this case is structural, our task is easy because the Supreme Court has determined that *Herring* error is structural."). But saying this was "*Herring* error" does not make it so.[5] Frost's counsel, unlike Herring's counsel, made a closing argument. The en banc court's statement that this was *Herring* error assumed the very issue in dispute, which is whether an unconstitutional partial limit on closing argument should be treated the same way as a total denial of closing argument.

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[5] The panel states that the Washington Supreme Court "explicitly held that the error here was *Herring* error, not mere trial error." (Pet. App. at 17a.) While the state court cited *Herring* to support its conclusion that the trial court "infringed upon [Frost's] Sixth Amendment right to counsel," it did not label the error "*Herring* error" or find that the trial court violated *Herring*. (Pet. App. at 128a.) The court did not reference *Herring* at all in its discussion of harmless error and did, in fact, find that the error was "mere trial error." (Pet. App. at 132a ("[A]n erroneous limitation of the scope of closing argument merely affects the trial process itself." (internal quotation marks omitted).)

This Court has not clearly established the answer to that question, and "fairminded jurists could disagree" as to whether the *Herring* rule applies in this situation, thus precluding habeas relief. *Richter*, 131 S. Ct. at 786 (internal quotation marks omitted).

Only by extending *Herring* could the en banc panel conclude that "[p]recluding defense counsel from arguing a legitimate defense theory" is *Herring* error and, as a result, structural error. (Pet. App. at 12a.) As this Court recently held, however, "if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *Woodall*, 134 S. Ct. at 1706 (internal quotation marks omitted)). In *Woodall*, the Sixth Circuit read three Supreme Court cases together to conclude that this Court had "clearly established" that "a no-adverse-inference instruction was required at the penalty phase" of a capital trial when the defendant does not testify. *Id.* at 1702. This Court disagreed, refusing to adopt the view that "a state court commits AEDPA error if it unreasonably refuses to extend a legal principle to a new context where it should apply." *Id.* at 1705 (internal quotation marks and alteration omitted). The Court observed that "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *Id.* at 1706 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). "The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id.* at

1706–07. For the reasons set out above, it is not "so obvious" here.

By extending *Herring* to the facts in Frost's case, the en banc panel failed to give the state court's decision the deference that AEDPA requires.

B. The en banc panel improperly relied on its own circuit precedent in finding clearly established law.

This Court has warned federal habeas courts not to rely on any law other than that established in its holdings when determining "clearly established Federal law" under AEDPA. *See, e.g., Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (The Ninth Circuit's determination of clearly established law "rested in part on the mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.").

In finding the law "clearly established" that "preventing a defendant from arguing a legitimate defense theory constitutes structural error" (Pet. App. at 11a), the en banc panel cited and relied on its own circuit precedent, in violation of AEDPA's requirement that only this Court may determine what constitutes "clearly established Federal law." 28 U.S.C. § 2254(d)(1). Not only was it improper for the en banc panel to consult its own precedent in determining "clearly established Federal law," but, as the dissent points out, these cases do not support the panel's finding that the trial court's error was structural because neither case involved applying AEDPA's

deferential standard of review. (*See* Pet. App. at 27a–31a.)

In relying on its own circuit precedent to determine that the law is "clearly established" that the trial court committed structural error, the en banc panel failed to accord the proper deference to the Washington Supreme Court's contrary conclusion.

C. AEDPA precludes habeas relief where, as here, fairminded jurists could disagree as to the correctness of the state court decision.

Habeas relief is precluded when "'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 131 S. Ct. at 786. Here, fairminded jurists *have* disagreed, both in the Washington Supreme Court and in the Ninth Circuit, on whether the trial court's error was subject to harmless error review. And, given this Court's reluctance to find structural error, the state court was reasonable in reading *Herring* as establishing that only a complete denial of closing arguments is structural error. *See Washington v. Recuenco*, 548 U.S. 212, 218 (2006) ("Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal."); *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) ("[T]he Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless.").

Even if this Court were to agree with the en banc panel that the trial court's claimed error was structural, "there are reasonable arguments on both sides—which is all [Washington] needs to prevail in this AEDPA case." *Woodall*, 134 S. Ct. at 1707; *see also*

Richter, 131 S. Ct. at 786 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." (internal quotation marks omitted)). That "there are reasonable arguments on both sides" here is illustrated by the fact that dissenting opinions have issued at every level of appellate review. (*See* Pet. App. at 134a (Sanders, J., dissenting from Washington Supreme Court's application of harmless error review); 65a (McKeown, J., dissenting from Ninth Circuit panel's denial of habeas relief); 18a (Tallman, J., dissenting from en banc panel's finding of structural error)). Thus, not only *could* "fairminded jurists" disagree as to whether the error was structural, they have done so. The Ninth Circuit failed to accord the deference to the Washington Supreme Court's ruling that the error here was harmless.

CONCLUSION

This Court should grant the State of Washington's petition for writ of certiorari.

Respectfully submitted this 28th day of August, 2014.

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